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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. _____

SKAGGS COMPANIES, INC.,

Petitioner,

vs.

LOUIS WHATLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Earl K. Madsen
Bradley, Campbell & Carney
1717 Washington Avenue
Golden, Colorado 80401
(303) 278-3300

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether the Court of Appeals' affirmance of the finding that the employment discrimination claimant continued to accrue backpay even after the claimant's subsequent voluntary resignation from employment is consistent with this Court's decision in *Ford Motor Company v. Equal Employment Opportunity Commission*, decisions of other panels of the same Court of Appeals, and decisions of other Federal Courts of Appeal.

2. Whether the Court of Appeals' affirmance of the finding that the employment discrimination claimant continues to accrue backpay after the claimant's voluntary resignation and while the claimant was unavailable for work and disabled due to disability incurred while working for a subsequent employer voluntarily chosen by claimant, is consistent with this Court's decision in *Ford Motor Company v. Equal Employment Opportunity Commission*, decisions of other Federal Courts of Appeal, and with the remedial standards of Title VII.

3. Whether disability payments in a workmen's compensation settlement received by the employment discrimination claimant for disability incurred while working for a subsequent employer after claimant's voluntary resignation should be deducted from or offset against the employer's backpay liability.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Skaggs Companies, Inc. ("Skaggs"), asks this Court to review the May 9, 1983 judgment of the United States Court of Appeals for the Tenth Circuit in *Whatley*, Plaintiff-Appellant and Cross-Appellant, v. *Skaggs Companies, Inc.*, Defendant-Appellant and Cross-Appellee.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Whatley v. Skaggs Companies, Inc.*, ___ F.2d ___, 31 FEP Cases 1202 (10th Cir. 1983). The slip opinion is set forth as Appendix A to this petition. The two decisions of the federal district court below, the opinion on liability and the supplemental opinion on backpay liability are reported at 502 F.Supp. 370, 27 FEP Cases 452, and 508 F.Supp. 302, 27 FEP 459, respectively. These two opinions are included herein as Appendices B and C, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1983. Skaggs' petition for rehearing and suggestion for rehearing *en banc* was denied on June 13, 1983, as shown in Appendix A, p. 28. This court has jurisdiction to review the Court of Appeals' decision by writ of certiorari under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The relevant provisions of the Civil Rights Act of 1964, as amended, Title VII, 42 U.S.C. §2000e-2(a), (j) and -5(g) are set forth in Appendix D1-2. The Civil Rights Act, 42 U.S.C. §1981, is also set forth in Appendix D3.

STATEMENT OF THE CASE

This case arises under Title VII, with additional claims based on the 1866 Civil Rights Act, 42 U.S.C. §1981. The claimant, Mr. Whatley, brought this action against Skaggs alleging that it discriminatorily demoted him in September, 1971 from Lobby Manager to Warehouse Clerk, based on his hispanic national origin, in violation of Title VII, 42 U.S.C. §2000e-2, *et seq.*, and the Civil Rights Act, 42 U.S.C. §1981. The District Court found that the demotion was in violation of these Acts. The Court of Appeals for the Tenth Circuit affirmed the decision and all backpay findings and conclusions of the district court.

The claimant was first employed by the Skaggs Companies on August 28, 1965 as a parttime employee, and he later became a fulltime employee and held several positions in retail stores of the Skaggs Companies in the Denver metropolitan area. On November 7, 1969, the claimant, Mr. Whatley, was promoted to the position of Lobby Manager at the Skaggs Companies' Lakeside store, Store 22, and he remained in that capacity at that store through September 16, 1971.

On September 17, 1971, Mr. Whatley was transferred to the Denver Warehouse as a Clerk and he remained there through June 8, 1973, when he voluntarily resigned his employment.[1] Mr. Whatley was eligible thereafter for re-employment with the company at the Warehouse, as set forth in the company's records (Defendant's Exhibit "A", p. 2).[2]

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[1] When claimant told the Skaggs District Manager that he was going to resign, the District Manager offered claimant another and higher paying job, diesel truck driver. Claimant declined the job (Tr. 349, Defendant's Ex. "O").

[2] Record references are as follows: With respect to the District Court decision on liability, transcript of testimony references are simply referred to by transcript page; references to the exhibits will be by reference to Plaintiff's exhibits by number, and to Defendant's exhibits by letter.

Mr. Whatley was transferred and reassigned to the Warehouse on September 17, 1971, by the District Manager for the Denver District of the Skaggs Companies, because the General Manager of the particular store in which Mr. Whatley was working, Store 22, had told the District Manager that Mr. Whatley was not going to make it as a Manager, and was not qualified to remain in the position of Lobby Manager at the store (Tr. 322-324; 379). The District Manager then initially planned on terminating the employment of the claimant, Mr. Whatley, but after Mr. Whatley requested that he be allowed to transfer to the Warehouse rather than be terminated (Tr. 326) the District Manager relented. The District Manager then voided the scheduled termination, sent the claimant to the Warehouse to work as a Warehouse Clerk.[3] The claimant accepted transfer to the Warehouse and remained at the Warehouse until June 8, 1973, nearly two years later, when he voluntarily resigned his employment.

The District Court held, see App. B, p. 49, that the company's decision to transfer or demote Mr. Whatley from the position of Lobby Manager to the position of Warehouse Clerk, even though it represented a "relenting" of the District Manager's previously planned termination of Mr. Whatley, nevertheless was the legal equivalent to a "termination" of employment, effective September, 1971. The District Court explained in its order, App. B, p. 49, that since Mr. Whatley was "dismissed" as Lobby Manager in September 1971, this was a "termination" and therefore his reassignment and

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[3]Defendant's Exhibits "A" and "O", personnel records, showed continuous employment of claimant Whatley without interruption from August 28, 1965 to the date of his resignation on June 8, 1973. Plaintiff's Exhibit 26, an employment termination form, showed that such form had been prepared for a termination of claimant Whatley by Skaggs in September, 1971, but the word "void" was then written on the face of the form at the direction of the District Manager and Mr. Whatley's employment was *not* terminated.

employment at the Warehouse as a Clerk had the same "legal effect" as a *new* job. App. B, p. 50; App. C, p. 68.

The District Court in the same supplemental findings, App. C, p. 68, found that Mr. Whatley much later, on June 8, 1973, left the Warehouse Clerk job by his own *voluntary* resignation, and by such act "lost his profit-sharing rights." The District Court held that Mr. Whatley's forfeiture of these rights was a natural result of his voluntary resignation in 1973 from his Skaggs' employment, and could not be considered as part of backpay in this matter.

The District Court then granted full backpay eligibility from September, 1971 to the date of the trial in September, 1980, including periods of disability and unavailability from the work force. Skaggs appealed the decision of the District Court to the United States Court of Appeals for the Tenth Circuit, and a three-judge panel of that court entered its decision on May 9, 1983, affirming the decision of the District Court. The basis for the decision of the United States Court of Appeals for the Tenth Circuit affirming all backpay findings and conclusions of the District Court was that under Title VII, 42 U.S.C. §2000e-5(g), that Act:

> leaves to the discretion of the trial court the amount of backpay to be awarded a successful plaintiff in an employment discrimination action. Absent an abuse of that discretion, the appellate court will not disturb the trial court's determination. App. A, p. 38.

Skaggs filed its timely petition for rehearing and suggestion for rehearing *en banc*, urging that the Court of Appeals erred in its adoption of its narrow and limited scope of review of the backpay award, and erred in holding that backpay accrued after the voluntary resignation of the claimant in 1973, and after claimant voluntarily chose other employment after his resignation, and during periods of unavailability and disability after his resignation and to date of trial in 1980.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals below poses substantial questions in the administration of backpay remedies under Federal Employment Discrimination Statutes. Fundamentally at issue is whether and to what extent employers can properly be required to hold discrimination claimants harmless against the risks of unemployment and disability incurred after the claimant has voluntarily quit his employment with the employer. The Court's decision holds that periods of labor market unavailability of the claimant *after* such voluntary quit, including periods when the claimant was unavailable due to a disability incurred with a subsequent employer are included in the backpay accrual period. Moreover, the Court's decision holds that even though periods of disability are included in the backpay accrual period, the defendant former employer is not permitted to offset disability insurance payments paid to the claimant to compensate him for such periods of disability, thus effectively requiring the defendant former employer to double compensate the claimant.

Review by this Court is necessary because those holdings of the Court of Appeals below conflict with other decisions of the same Court of Appeals, and decisions of other Circuits. In addition, the writ should be granted because the Tenth Circuit has adopted standards for calculation of backpay, which this Court has expressly rejected in *Ford Motor Co. v. Equal Employment Opportunity Commission*, ___ U.S. ___, 102 S.Ct. ___, 73 L.Ed.2d 721, 29 FEP Cases 121 (1982).

The decision below, if left standing, will affect not only the rights of parties in future backpay proceedings under Title VII, but the administration of backpay remedies under other Federal employment discrimination laws as well. The District Court and the Court of Appeals below treated the backpay standards for the found violation of Title VII and 42 U.S.C. §1981 to be identical. These backpay standards will also apply to

claims brought under the National Labor Relations Act, 29 U.S.C. §§151-69, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280, 10 FEP Cases 1181 (1975), and presumably backpay calculations under the Age Discrimination in Employment Act as well, see 29 U.S.C. §621 *et seq.* Thus, the questions posed herein are clearly of substantial and ongoing importance in the administration of Federal employment discrimination laws.

I.

THE DECISION BELOW RAISES SUBSTANTIAL FEDERAL QUESTIONS IN THE ADMINISTRATION OF BACKPAY REMEDIES IN FEDERAL ANTIDISCRIMINATION STATUTES IN HOLDING THAT THE DEFENDANT EMPLOYER MUST INSURE DISCRIMINATION CLAIMANT AGAINST RISKS OF UNEMPLOYMENT AND DISABILITY INCURRED WITH OTHER EMPLOYERS AFTER CLAIMANT'S VOLUNTARY RESIGNATION, IN CONFLICT WITH THIS COURT'S DECISION IN *FORD MOTOR CO. v. EEOC* AND OTHER DECISIONS OF THE TENTH CIRCUIT, AND DECISIONS OF OTHER CIRCUITS.

Since the District Court expressly found and the Court of Appeals affirmed that the claimant in this case was *not* constructively discharged by Skaggs, the backpay principles applied below will, unless reversed by this Court, stand as precedents to be applied in any future case in which an employee *voluntarily* resigns his employment after some action by his employer that is later found to be discriminatory, and then *voluntarily* accepts a position with another employer. If left standing, these precedents will create substantial problems in

the administration of backpay remedies under Federal employment discrimination statutes, because the principles applied by the court below are fundamentally at odds with the decision of this Court in *Ford Motor Co. v. Equal Employment Opportunity Commission*, ___ U.S. ___, 102 S.Ct. ___, 73 L.Ed.2d 721, 29 FEP Cases 121 (1982) and with the decisions of other panels of the Tenth Circuit and other circuits.

The Conflict With Ford Motor Co. v. EEOC.

In *Ford Motor Company v. Equal Employment Opportunity Commission*, ___, U.S. ___, 102 S.Ct. ___, 73 L.Ed.2d 721, 29 FEP Cases 121, (1982) this court held that while backpay is a remedy which the courts may invoke in the exercise of their sound discretion, nevertheless, the reviewing court must exercise this power in light of the "large objectives of the Act," and in doing so must be guided by "meaningful standards enforced by thorough appellate review," citing to this court's decision in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415, 416. This court then further cited from its previous decision in *Albemarle Paper Co., supra*, holding that "discretionary choices are not left to the court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" 73 L.Ed.2d at 729; 29 FEP Cases at 125.

Applying these principles, this Court concluded, 73 L.Ed.2d at 734, 29 FEP Cases at 128, that to hold Ford responsible for backpay after the claimants lost their jobs and then had obtained a better job with another employer, would require:

> that Ford insure them against the risks of unemployment in a new and independent undertaking. Such a rule would not merely restore [claimants] to the 'position where they would have been were it not for the unlawful discrimination' [citing *Albemarle Paper Company v. Moody*, 422 U.S. at 421, 10 FEP Cases at 1189 (1975)]; it would catapault them into a better position than they would have enjoyed in the absence of discrimination.

This Court expressly rejected such a rule and reversed the decision of the Fourth Circuit in that case.

Like the decision of the Fourth Circuit in that case, the decision of the Tenth Circuit below has the perverse result of requiring the employer to insure the claimant against the risk of other employment voluntarily chosen. The claimant here, after continuing in Skaggs employ long after the transfer to another job, or demotion found to be discriminatory by the Courts below, voluntarily quit his employment with Skaggs, and then about a year or more later, voluntarily accepted a position with another employer. The rationale of the *Ford* decision, *supra*, requires the conclusion that in these circumstances, ongoing accrual of backpay liability stopped when the claimant voluntarily terminated his Skaggs employment to seek employment elsewhere. Such conclusion, moreover, is completely consistent with Title VII's policy of making whole the discrimination victim, while at the same time placing a logical end point on the employer's liability to a former employee.

The effect of the decision of the Court of Appeals is to place employers, who believe they have not discriminated despite the claims of the claimant, in an unsolvable dilemma. The employer cannot have any protection from such claims, unless it reinstates immediately and provides full backpay to the claimant. This is no choice at all, because it requires the employer to surrender his defense. Even assuming the case could proceed to trial after such conduct by the employer and reinstatement with full backpay for the claimant, the employer would have no recourse against the claimant for the cost of such backpay even were it erroneously paid to the claimant.

The backpay rules adopted in other decisions of the Court of Appeals below, and other Courts of Appeals, as well as those established by this Court in *Ford Motor Co. v. EEOC*, *supra*, sensibly permit the claimant to retain

his employment with the employer, and seek full backpay in court, affording the defendant employer the opportunity to raise its defences at trial. In the alternative, these rules permit the employee at his own free and voluntary choice, to resign such employment and seek employment elsewhere, thereby stopping the backpay accural period. This Court has recognized this employer dilemma and the sensibility of such rules terminating backpay accrual periods as resolving that dilemma without compelling either claimant or employer to compromise claims or surrender defenses. *Ford Motor Company v. EEOC, supra*, 73 L.Ed.2d at 738, n. 29, 29 FEP Cases 131, n. 29.

The Court of Appeals' decision forces Skaggs to insure the claimant, and "catapaults" him into a better position than he would have enjoyed absent any discrimination. The decision below forces Skaggs to insure the claimant against risks of unemployment and even disability in new and independent undertakings voluntarily chosen by the claimant. Accordingly, the claimant is now in a much better position than he would have been absent any discrimination found by the District Court.

The Conflict With Decisions of the Tenth and Other Circuits.

The Court of Appeals' panel deciding this case, entered a decision in conflict with a different panel of the Court previously in *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 11 FEP Cases 449 (10th Cir. 1975), and also another panel of the Court in *Muller v. U.S. Steel Corp.*, 509 F.2d 923, 10 FEP Cases 323 (10th Cir. 1975) holding, that when, as here, the claimant accepts employment elsewhere, such resignation and acceptance of other employment cuts off the backpay accrual period. See *Taylor v. Safeway Stores, Inc., supra*, 524 F.2d 267-268, 11 FEP Cases at 451. The Tenth Circuit held in *Muller v.*

U.S. Steel Corp., supra, 509 F.2d at 924, 10 FEP Cases at 329:

> Unless appellant was constructively discharged, he would not be entitled to damages in the form of backpay, interest and retirement from the date of leaving the Steel Company's employ. His damage would be measured by the difference between actual pay and the amount he would have made if he had been chosen as spell foreman during the period from September 17, 1967 until he quit, August 6, 1969.

Failure to apply the same rule in the Skaggs case results in a decision of the panel of the Court of Appeals in this case which is squarely inconsistent with the prior decisions in *Muller v. U.S. Steel Corp., supra*, and *Taylor v. Safeway Stores, Inc., supra*.

The decision of the Court of Appeals in this case also conflicts with applicable decisions of sister Federal Courts of Appeal. Several other Circuits have ruled that the voluntary resignation of employment by the claimant does terminate the backpay accrual period, and limits backpay liability of the employer. See, for example, *Bourque v. Powell Electrical Manufacturing Company*, 617 F.2d 61, 22 FEP Cases 1191 at 1194 (5th Cir. 1980). In that decision, the Court of Appeals for the Fifth Circuit had before it a claimant who alleged that she was forced to resign her position because she was given compensation that she knew to be not equal to that earned by males holding the same or similar job. The claimant argued that such was a constructive discharge. The Fifth Circuit held that such circumstances did not result in a conclusion of constructive discharge:

> We have no question that her resignation resulted directly from her disappointment in not receiving the raise she had expected. We cannot fault her for that disappointment. Nevertheless, we cannot accept that under the circumstances presented

> here a reasonable employee would have felt compelled to resign. Moreover, we believe that discrimination manifesting itself in the form of unequal pay cannot, alone, be sufficient to support a finding of constructive discharge.

617 F.2d at 62, 22 FEP Cases at 1194.

The Court then limited the plaintiff to backpay measured by the difference between the rate at which she was compensated and the rate at which male buyers were compensated in the backpay period measured by the period the claimant was actually employed by the defendant as a buyer. Thus, the Court cut off the backpay accrual period at the date of her resignation. The Court plainly noted this in its footnote 8, at 617 F.2d 62, 22 FEP Cases at 1194:

> Plaintiff also contends that even if she was not constructively discharged, the proper measure of damages would be the difference between the rate at which she was compensated and rate at which male buyers were paid and that the backpay period should have continued until she obtained permanent employment. We find no error in the trial court's decision to limit damages to the period [the claimant] was employed by defendant as a buyer. See *Muller, supra*, 509 F.2d at 930, 10 FEP Cases at 329; *Schlei & Grossman, supra*, at 1240 n. 23 (1976).

The Court of Appeals for the Fifth Circuit cited and relied upon the decision of the Court of Appeals for the Tenth Circuit noted above in this petition for certiorari, that is *Muller v. United States Steel Corporation*, 509 F.2d 923, 10 FEP Cases 323 (10th Cir. 1975), cert. denied, 423 U.S. 825, 96 S.Ct. 39, 46 L.Ed.2d 41, 11 FEP Cases 576 (1975) for its holding. Reference by that Court also to the most accepted treatise in this field, Schlei & Grossman, *Employment Discrimination Law*, for the same point indicates the extent to which this basic concept in backpay accrual and liability under Title VII has been established in this field of law.

Moreover, recently, in *Clark v. Marsh*, 665 F.2d 1168, 26 FEP Cases 1156, (D.C. Cir. 1981), the Court of Appeals for the District of Columbia adopted both the *Muller v. U.S. Steel, supra*, and *Bourque v. Powell Electrical Manufacturing Company, supra*, decisions, and concluded that the established law under Title VII requires that backpay accrual is cut off with the voluntary resignation of the claimant from the employment with the defendant employer. The court articulated the basic reason established for such rule. That reason is that a claimant must mitigate his or her damages by remaining on the job unless the employer makes the job so onerous as to force the resignation of the employee, that is, to force a "constructive discharge." The Court of Appeals in *Clark v. Marsh, supra*, stated this concept as follows:

> A Title VII plaintiff must, therefore, 'mitigate damages by remaining on the job' unless the job presents 'such an aggravated situation that a reasonable employee would be forced to resign.' [citing *Bourque v. Powell Electrical Manufacturing Company*, 617 F.2d at 66.] Because discrimination manifested in the form of unequal pay cannot itself constitute such an aggravated situation [again citing *Bourque*, supra], and because plaintiff offered no further evidence of other objectionable working conditions, the court concluded that a finding of constructive discharge could not be sustained.

665 F.2d at 1173-1174.

This duty to minimize damages has previously been described by this Court as "rooted in an ancient principle of law", reported in C. McCormick, *Handbook on the Law of Damages*, 127-158 (1935) which requires the claimant to "use reasonable diligence in finding other suitable employment." *Ford Motor Co. v. EEOC*, 73 L.Ed.2d at 732, 29 FEP Cases at 127. In the context of a demotion on the job, the employee's duty to mitigate damages requires that he remain on the job, unless and until the employer

undertakes such deliberate actions through "aggravating factors" as to "constructively discharge" the claimant by forcing his quit. In the instant case, the District Court as affirmed by the Court of Appeals held that the voluntary quit of the claimant from his Skaggs employment on June 8, 1973, was his own voluntary act and was not a constructive discharge.

These cases all confirm a basic Title VII policy. That policy is that society will be best served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships. *Bourque v. Powell Electrical Manufacturing Company*, 617 F.2d at 66 (5th Cir. 1980); *Clark v. Marsh*, 665 F.2d at 1173. Only in the event that the employee is forced to resign, so that the resignation is not voluntary but is rather a "constructive discharge," will that policy be superseded by the other Title VII policy that is, an employer must not be permitted to stop the backpay accrual period simply by creating such onerous circumstances by "aggravating factors" that the employee is forced to resign. *E.g. Clark v. Marsh, supra*, 665 F.2d at 1174.

Recently, after the decision in *Clark v. Marsh, supra*, the United States Court of Appeals for the Tenth Circuit in *Irving v. Dubuque Packing Co.*, 689 F.2d 170 (1982) reiterated the basic rule that constructive discharge must be based on other "aggravating factors", citing with approval *Bourque v. Powell Electrical Manufacturing Company, supra*, and *Clark v. Marsh, supra*, as well as *Muller v. U.S. Steel, supra*. Those authorities are in stark and direct conflict with the decision reached by the three-judge panel of the United States Court of Appeals for the Tenth Circuit in this case with respect to continuation of the backpay accrual period even *after* the voluntary resignation, expressly found *not* to be a constructive discharge.

II.

THE DECISION BELOW HOLDING THAT THE BACKPAY ACCRUAL LIABILITY PERIOD FOR THE DEFENDANT EMPLOYER MUST INCLUDE POST-VOLUNTARY RESIGNATION PERIODS OF UNAVAILABILITY FROM THE LABOR FORCE, AND DISABILITY INCURRED IN VOLUNTARY EMPLOYMENT WITH A SUBSEQUENT EMPLOYER, CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

It is established law in the field of employment discrimination law that periods of disability and unavailability from the labor market are not to be included in the backpay accrual period. In *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 11 FEP Cases 449, at 451 (10th Cir. 1975) another panel of the United States Court of Appeals for the Tenth Circuit held that a claimant enrolled in college full time is not someone who is "ready, willing and available" for employment, and is thus not entitled to a backpay award. The court significantly commented in this regard as follows:

> If a discharged employee accepted employment elsewhere, there is little doubt that this would cut off any backpay award. If not, the employee would be receiving a double benefit for the same period of time. Likewise, when an employee opts to attend school, curtailing present earning capacity in order to reap greater future earnings, a backpay award for the period while attending school also would be like receiving a double benefit.

524 F.2d at 267-268.

Other decisions in sister Courts of Appeals have adopted the same basic standard that periods in which the claimant is not ready, willing and available for employment in the labor market cannot be included in

the backpay calculation period. See, *e.g.*, *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387, 10 FEP Cases 1249 (7th Cir. 1975), where the Court of Appeals held that the plaintiff could not recover backpay during an eighth month period while she was pregnant since she could not have worked as a stewardess while pregnant and was therefore not ready and available for work.

Schlei & Grossman, *Employment Discrimination Law*, 2d Edition, BNA, 1983, Chapter 38, Monetary Relief, paragraph 6, "Periods of Unavailability," p. 1450, state as follows on this point:

> Periods of unavailability, whether because of illness, disability, or other reasons, have been excluded from backpay awards under both Title VII and under the [National Labor Relations Act] NLRB.

The authors of this learned treatise in footnote 147 cite representative authorities with respect to the rule that there is no backpay for periods where employees are unemployable due to illness or otherwise unable to work. See, for example, *Walston v. School Board of Suffolk*, 566 F.2d 1201, 16 FEP Cases 728 (4th Cir. 1977); *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 13 FEP Cases 517 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Peters v. Missouri Pac. R.R. Co.*, 483 F.2d 490, 6 FEP Cases 163 (5th Cir. 1972), *cert. denied*, 414 U.S. 1002 (1973). See also *Inda v. United Air Lines, Inc.*, 405 F.Supp. 426 (N.D. Cal. 1975), aff'd in part, vacated in part on other grounds, 565 F.2d 554, 16 FEP Cases 251 (9th Cir. 1977), *cert. denied*, 435 U.S. 1007, 98 S.Ct. 1877, 56 L.Ed.2d 388, 17 FEP Cases 553 (1978) holding that periods of unavailability due to two pregnancies for a time period of 13.6 months must be excluded from the backpay accrual period. This rule is a familiar one cited above, see *e.g. Peters v. Missouri Pac. R.R. Co., supra*, holding that periods of unavailability because the plaintiffs would have been "physically unable to work" must also be excluded from the backpay calculation period. (483 F.2d at 492, see n.4, 6 FEP Cases at 165.)

In the present case, claimant Whatley at trial admitted that after he resigned his Skaggs employment on June 8, 1973, he did not look for work or obtain other work until later in 1974-75 (Tr. 178, 179). He then testified that he was disabled and not able to work for the time period from 1975 through 1980, and testified at trial that he has never worked for *any* employer since 1975. (Tr. 137, Tr. 19). He testified at trial that he has a current disability, (Tr. 231) but that he "can't answer" the complete status of his current disability (Tr. 231), other than the fact that he has a "certain percent of disability" (Tr. 231). The Court of Appeals expressly adopted the finding that claimant was disabled and not in the labor force from 1975-1980, App. A, p. 38. The Court, nevertheless, affirmed the District Court's bootstrap finding that if Skaggs had not demoted ("terminated") the claimant from Lobby Manager to Warehouse Clerk in September, 1971, he would not have sought blue collar work with a meatpacking company in late 1974, and he would not have been injured in *that* job in 1975, and would not have been disabled App. A, p. 36. The Court has thus effectively required Skaggs to be the insurer of unemployment and disability in claimant's future working life *after* his voluntary resignation on June 8, 1973, nearly two years after his demotion ("termination") on September 17, 1971. This ruling of the Court of Appeals, again, is plainly in conflict with this court's decision in *Ford Motor Co. v. Equal Employment Opportunity Commission, supra.*

The undisputed evidence that the claimant was disabled or unavailable from the labor market or looking for work in the labor market from 1973-mid 1974, and again from 1975 through the date of trial in 1980, also conclusively establishes a failure on the part of claimant Whatley to mitigate damages. See and compare *Sangster v. United Air Lines, Inc.*, 633 F.2d 864, 24 FEP Cases 845 (9th Cir. 1980), *cert. denied* 451 U.S. 971, 68 L.Ed.2d 350, 101 S.Ct. 2048 (1981). In that case a supervisor for the air lines quit and for nine years thereafter did not hold any

employment. The Court of Appeals for the Ninth Circuit held that this evidence conclusively showed that the supervisor failed to meet her duty to mitigate damages under the Act. Claimant Whatley's instant six-year period of voluntarily chosen unemployment from 1975 through the date of trial in 1980, assuming his disability did not prevent some other employment, conclusively showed a failure to mitigate damages. The Court rejected the evidence and this argument and held that periods of disability and unavailability would be included in the backpay calculation period, App. A, pp. 38-39. Thus, even after claimant Whatley resigned his employment on June 8, 1973, and subsequently found other employment in late 1974 for a short period of time, during which he became permanently and at least partially disabled, all such periods of unavailability and disability following his resignation from Skaggs have been held to be within the backpay accrual period for which Skaggs is responsible to the claimant. As stated, this is flatly contrary to this Court's *Ford Motor Co. v. EEOC*, *supra*, decision and applicable precedent in sister circuits. Furthermore, it sets the remedial standards of Title VII upside down.

The statute itself provides, Title VII, 42 U.S.C. §2000e-5(g):

> Backpay liability shall not accrue from a date more than two years prior to the filing of the charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the backpay otherwise allowable.

If such periods of unavailability and disability of claimant Whatley are to be considered as accrual periods, that would squarely contradict the statute by entitling him to compensation from Skaggs in the form of backpay for periods when he is *not* able, willing, or available to look for work or to work, and either will not or cannot

mitigate backpay with interim earnings which would otherwise be earnable through reasonable diligence by the claimant. Such double recovery repudiates the statutory remedial scheme.

The findings and conclusions of the Court of Appeals in affirming the District Court thus flatly contradict this Court's decisions, applicable authorities of other panels of the court and sister circuits, as well as the statutory remedial system itself.

III.

THE DECISION BELOW RAISES A SUBSTANTIAL FEDERAL QUESTION WHETHER STATE DISABILITY BENEFITS PAYMENTS MADE EXPRESSLY TO COMPENSATE THE CLAIMANT FOR PERIODS OF DISABILITY FROM THE LABOR FORCE SHOULD BE OFFSET FROM BACKPAY TO AVOID DOUBLE COMPENSATION TO THE CLAIMANT.

Claimant Whatley received a lump sum workmen's compensation settlement from the State of Colorado in the amount of $30,126, for his permanent partial disability. Defendant's Exhibit L. The District Court held that this sum could not be offset from the backpay held to be due. The District Court held even though periods of disability must be included in the backpay accrual period, that Mr. Whatley's workmen's compensation benefits were "collateral" benefits and could not be offset

by Skaggs from the backpay ordered by the Court.[1] The District Court relied upon a decision of the United States Court of Appeals for the Tenth Circuit in *EEOC v. Sandia Corp.*, 639 F.2d 600, 23 FEP Cases 799 (10th Cir. 1980) for such holding. The District Court treated workmen's compensation funds as equivalent to unemployment compensation funds.

However, it was legally incorrect to compare the workmen's compensation settlement fund with unemployment compensation benefits. Unemployment compensation is payable to a claimant who is actively seeking work and is ready and able to work and in the labor market but simply cannot find work [Colorado Revised Statutes 1973 §8-73-107(2)(c), and 107 (1)(c)(I) (1980 Supp.).] The conditions of eligibility for unemployment compensation are thus compatible with the reasonable diligence requirement for backpay eligibility. In the case of a workmen's compensation settlement, on the other hand, that settlement is designed to compensate the claimant for periods when the claimant was disabled

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[1]The workmen's compensation settlement of claimant, Defendant's Ex. "L", is to compensate for lost income due to disability, and expressly recites that "all medical expenses" of claimant for his "back surgery" as a result of his November 7, 1975 accident were *previously* paid by the insurer, Employers Insurance of Wausau. Such medical expenses were expressly excluded from the settlement. While the claimant is referenced in the settlement as permanently partially disabled, the District Court held claimant able to work for Skaggs and ordered reinstatement. App. B, p. 7. Thus the workman's compensation fund, according to the Court, compensates claimant Whatley for lost income during his periods of disability.

and, thus, not able to look for work or to be in the labor market.[7]

The decision below also conflicts with the decision of the Court of Appeals for the Second Circuit, in *Equal Employment Opportunity Commission v. Enterprise Association Steamfitters*, 542 F.2d 579 (1976), *cert. denied*, 430 U.S. 911, 97 S.Ct. 1186, 51 L.Ed.2d 588 (1977), which held that public assistance could be deducted from backpay awarded under Title VII. The Second Circuit based its decision upon policy considerations holding that it saw "no compelling reason for providing the injured party with double recovery for his lost employment . . . and [that the court was] not in the business of redistributing the wealth beyond the goal of making the victim of discrimination whole." 542 F.2d at 592. Accord, *Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743 at 756 (7th Cir. 1983), deducting both unemployment compensation benefits and pension benefits from backpay awarded, to avoid double recovery. See also *Naton v. Bank of California*, 649 F.2d 691, 699-700 (9th Cir. 1981) authorizing such deductions.

The workmen's compensation benefits involved here thus cannot properly be analogized to the unemployment compensation benefits which this Court addressed in *NLRB v. Gullet Gin Company, Inc.*, 340 U.S. 361, 71 S.Ct. 337, 95 L.Ed. 337 (1950). In that case this Court approved the rule that unemployment benefits may not be deducted from backpay awards, since unemployment compensation payments to employees are not made to discharge any liability or obligation of the employer but

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[7] The NLRB in discriminatory refusal to hire and unlawful discharge cases has allowed deduction of workmen's compensation income from backpay awarded, as part of interim mitigation earnings See *Alberichi Construction Co.*, 249 NLRB 751, 104 LRRM 1444 (1980) and see in particular *American Manufacturing Co.*, 167 NLRB 520, 522-523, 66 LLRM 1122, 1125-26 (1976). In the *American* case, the NLRB noted that the purpose of the rule was to avoid double payment to claimant to the extent such sums are intended to replace claimant's lost wages due to disability. 167 NLRB at 523, 66 LRRM at 1126.

to carry out a policy for the benefit of the entire state. To the contrary in the instant case, the workmen's compensation is expressly designed to compensate the employee for his lost wages from disability incurred with his subsequent employer, and the fact that the claimant was unable to work because of such disability. The policy considerations are quite different from those involving unemployment compensation benefits and the payments are expressly made for the condition held to be the liability of the employer in this case. The failure of the Court below to recognize these differences was clear error and resulted in a precedent which, if allowed to stand, will cause continuing problems and conflicts in the administration of backpay remedies in employment cases in the future.

CONCLUSION

For the reasons stated above, Petitioner requests that its petition for writ of certiorari be granted.

Respectfully submitted,

BRADLEY, CAMPBELL & CARNEY
Professional Corporation

By _____

Earl K. Madsen, #0655
1717 Washington Avenue
Golden, Colorado 80401
(303) 278-3300

Attorneys for Petitioner

United States Court of Appeals

For the Tenth Circuit

SLIP OPINION

APP. A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LOUIS WHATLEY,

Plaintiff-Appellee,
and Cross-Appellant,

v.

SKAGGS COMPANIES, INC.

Defendant-Appellant,
and Cross-Appellee.

Nos. 81-1303
81-1357

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 76-C-449)

Earl K. Madsen of Bradley, Campbell & Carney, Golden, Colorado for Defendant-Appellant and Cross-Appellee.

Paul A. Baca, Attorney, Denver, Colorado, for Plaintiff-Appellee and Cross-Appellant.

Before SETH, Chief Judge, and HOLLOWAY and McWILLIAMS, Circuit Judges.

HOLLOWAY, Circuit Judge

Defendant-appellant Skaggs Companies, Inc., brings a timely appeal in No. 81-1303 from a judgment, following a trial to the court, in favor of plaintiff-appellee Louis Whatley, a former Skaggs employee, on his employment discrimination claim against defendant for allegedly discriminatory treatment of plaintiff because of his status as a Mexican-American. Plaintiff bases his claims on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, *et seq.*,[1] as amended, and the Civil Rights Act of 1870, 42 U.S.C. §1981.[2] Plaintiff Whatley cross-appeals in No. 81-1357, asserting error in an off-set against the back pay award, exclusion of profit-sharing income from the award, and failure to award interest.

The district court entered findings, conclusions, and judgment for plaintiff and further ordered that the parties confer in an attempt to reach an agreement on the proper amount of back pay to be awarded. 502 F.Supp. 370. The court withheld entry of final judgment until after determination of back pay and attorney's fees awards.

The parties were unable to reach agreement. Consequently, the court held a hearing to determine the

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[1]42 U.S.C. §§2000e — 2000e-17 deal with equal employment opportunities. 42 U.S.C. §2000e-2(a)(1) provides:

> It shall be an unlawful employment practice for an employer— to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

[2]42 U.S.C. §1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

appropriate level of back pay and attorney's fees. It then made supplemental findings and conclusions, entered judgment in favor of plaintiff for $89,236.15, plus costs, and attorney's fees in the amount of $5,115.00. 508 F.Supp. 302. The appeal and cross-appeal followed.

I

Defendant operates a large chain of retail stores. During the time of plaintiff's employment, most of the stores sold prescription drugs, over-the-counter drugs, and sundries. The organizational district containing the stores in which plaintiff worked consisted of ten stores.

Management in each of defendant's stores consisted of a general manager who was responsible for the entire store; an assistant general manager directly responsible for the drug sales area which constituted the bulk of the sales floor in each store and who was responsible for the entire store in the general manager's absence; and a lobby manager who was directly responsible for candy, tobacco, and film counters which were usually located in the front of the store beyond the line of checkout counters. The lobby manager ordered merchandise, organized displays, and scheduled employees for work in his area. Defendant's stores were staffed by clerks assigned to each area. A district manager oversaw the operations of a number of different stores.

Promotions to the lowest managerial position were usually made from among the clerks. Lobby managers could be promoted to assistant general managers and assistant general managers to general managers. Promotion usually also meant transfer to another store in defendant's chain. Recommendations for promotion or demotion were made by a store's general manager, sometimes accompanied by an assistant general manager's recommendation, to the district manager. Recommendations were always made orally. Defendant had no formal employee evaluation procedure; there were no written, objective standards or tests.

District managers forwarded recommendations from general managers to defendant's home office in Salt Lake City for approval or disapproval. During the time of plaintiff's employment, the district manager supervising the stores in which he worked was Arnold Ford. Ford testified that he consistently supported recommendations made by the general managers under his supervision.

II

The trial court's findings on plaintiff's claim were essentially as follows:

Plaintiff, a Mexican-American, began his employment with defendant as a clerk at defendant's Store No. 22 during the 1965 Christmas season. In January 1966 plaintiff accepted full-time employment as a clerk in that store. Store 22's general manager was then Gus Roe. Plaintiff worked through 1966 as a sales clerk. During 1966 Ellred Jensen became general manager of Store No. 22. In late 1966 or early 1967 plaintiff was involuntarily reassigned by Jensen to the shipping department.

In February 1968 Robert Benedict, general manager of defendant's Store No. 50, told Jensen that he needed a shipping clerk. Jensen reassigned plaintiff to Store No. 50, and in early 1969 plaintiff requested and received reassignment to the sales floor.

Benedict eventually recommended plaintiff to Ford for promotion. In November 1969 plaintiff was named lobby manager and reassigned to Store No. 22 where Jensen was still general manager. In April or May 1970, Store No. 22's then assistant general manager was replaced by Coleman Nay. Jensen and Nay worked as general manager and assistant general manager over plaintiff until plaintiff was fired as lobby manager.

On September 17, 1971, plaintiff was called to Jensen's office to meet with Ford and Jensen. Ford ordered plaintiff to surrender his keys to the store and

informed him that he was no longer a lobby manager. Ford testified that these actions terminated plaintiff's employment with defendant.[3] Ford, Nay, and Jensen had participated in the decision to dismiss plaintiff. Nay and Jensen both told Ford that plaintiff was performing poorly as lobby manager. Based on their opinions, Ford recommended plaintiff's termination to his superiors. With their approval, Ford dismissed plaintiff. When plaintiff asked why he was being fired, Jensen told him that, in his opinion, he would never be able to handle the position of general manager at one of defendant's stores. Plaintiff asked for reassignment to another position in defendant's organization, and Ford sent him to work in defendant's central Denver warehouse.

Plaintiff remained as a warehouseman with defendant until his resignation on June 8, 1973. Plaintiff gave as the reason for his resignation his inability to support his family on his wages. Plaintiff held part-time jobs until he found full-time employment with Gold Star Beef Company. A 1975 on-the-job back injury at Gold Star, however, resulted in his temporary total disability and he currently has a partial disability. Plaintiff now resides in Mesa, Arizona, in part for health reasons.

In explaining its rulings, the trial court first found that defendant failed to articulate a legitimate, non-discriminatory reason for plaintiff's dismissal to rebut

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[3] There is some dispute as to whether Ford's actions, in view of plaintiff's continued employment with defendant as described below, constituted dismissal or merely demotion. The trial judge characterizes the action as termination of employment, followed by rehiring. (I R. 79-80). Defendant characterizes the action taken as a demotion. (Brief in Chief of Appellant at 10-11). For purposes of Title VII liability, the proper characterization is immaterial. Be it dismissal or be it demotion, if defendant's action in relieving plaintiff of his status as a lobby manager was motivated by plaintiff's Mexican-American ancestry, defendant's action was unlawful. For purposes of awarding back pay to plaintiff, however, the characterization assumes importance. Based upon our review of the record, including Ford's, Nay's, and Jensen's testimony, we accept the conclusion of the trial judge that plaintiff was terminated by Ford's action on September 17.

the inference raised by plaintiff's *prima facie* showing of discrimination. The court based this finding upon its judgment that the testimony of defendant's witnesses Jensen and Nay as to a nondiscriminatory reason for their recommendations of dismissal was not credible. The court found that Jensen's testimony that plaintiff lacked good business sense was both unsupported and highly subjective. The specifics of Nay's testimony that plaintiff simply did not do his job were contradicted by plaintiff's witnesses, whom the court found to be credible, and defendant's attempts to impeach plaintiff were unsuccessful. Thus, the court found that the testimony offered by defendant purporting to establish a legitimate, nondiscriminatory reason for plaintiff's dismissal was not credible. (I R. 81-83).

Alternatively, the court found that even if defendant did articulate a legitimate reason for plaintiff's dismissal, plaintiff had rebutted the defense case by showing that defendant discriminated against him in making its decision to discharge him. The court found that although testimony from defendant's numerous Hispanic witnesses established that defendant had no company-wide policy of discrimination against Hispanics, this was of little comfort to plaintiff for it appeared that discrimination "played a major part in his firing-demotion," I R. 84, and he was not claiming a company-wide policy of discrimination. The court found as a fact that both Jensen and Nay used racial slurs in referring to Blacks, that both of them made ethnic jokes, some of which were directed at plaintiff and his wife, and that Nay had a history of problems with members of minority groups, both employees and customers. Defendant contested much of plaintiff's evidence regarding these matters, but the court resolved questions of credibility in favor of plaintiff and ultimately found that Jensen and Nay made their recommendations that plaintiff be dismissed as a result of their prejudice against him as a Mexican-American. (I R. 83-85).

The court's findings regarding the circumstances of plaintiff's dismissal buttressed the inference of discrimination. Neither Jensen nor Nay discussed with plaintiff the deficiencies in his performance which they said were responsible for his dismissal; none of defendant's officers or supervisory employees warned defendant that his position was in jeopardy; and plaintiff received no reprimand, warning, or counselling on how to improve. Hence the court determined that defendant's claims of deficiencies in plaintiff's performance were merely pretextual.

The trial court found that the proof adduced to establish defendant's liability on the Title VII claim was also sufficient to establish his §1981 claim. In some instances the discriminatory intent required to establish Title VII liability is different than that required to establish §1981 liability. For a Title VII claim of disparate impact of employment practices, the required intent is less than that for a §1981 claim. The court found that for this disparate treatment claim, the intent proven for the Title VII claim was sufficient to establish liability under §1981 as well.

III

For reversal, defendant first contends that the trial judge erred by completely misapplying the burden of proof in a Title VII disparate treatment case, that he shifted the burden of proving nondiscrimination to defendant, and that he failed to consider overwhelming evidence produced by defendant showing that plaintiff was dismissed for a nondiscriminatory reason. We find no merit in these contentions.

A *prima facie* Title VII claim here required a showing that plaintiff (1) is a member of a protected group, (2) he was qualified for the position from which he was dismissed, (3) he was removed from that position, and (4) he was replaced by someone not a member of the protected group. *See McDonnell Douglas Corp. v. Green*, 411 U.S.

792, 802; *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 n.6. The trial judge found that plaintiff has presented a *prima facie* case by his evidence that he is a Mexican-American, was qualified to be a lobby manager, was terminated, and was replaced by a white male. (I R. 80). The burden then shifted to the defendant to articulate a legitimate, nondiscriminatory reason for plaintiff's discharge. All that defendant need do to rebut plaintiff's *prima facie* case is produce evidence that there was indeed a legitimate reason for plaintiff's discharge. "The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Burdine*, 450 U.S. at 254. *See Verniero v. Air Force Academy School District No. 20*, ___ F.2d ___ (10th Cir. 4/13/83); *Mohammed v. Callaway*, 698 F.2d 395, 399 (10th Cir. 1983).

Defendant says that its witnesses did articulate a legitimate, nondiscriminatory reason for the treatment of plaintiff; in essence, that plaintiff was dismissed because he was not performing well enough as lobby manager to continue in the management of defendant's stores. (I R. 81).[4] Defendant argues that the trial court fundamentally erred by holding that:

> [T]o carry its burden, the defendant must present evidence that is at least credible. Since Skaggs has not presented credible evidence, it has not articulated any legitimate, nondiscriminatory reason for dismissing Mr. Whatley. Therefore, Skaggs

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[4]Defendant offered evidence by Ford, Nay, and Jensen as to plaintiff's poor performance as a lobby manager. Our examination of the record discloses that the evidence was sufficiently specific to constitute a proper articulation of a legitimate reason for plaintiff's dismissal. *See* I R. 81-83. *Burdine* requires that in fairness to plaintiff, defendant's evidence regarding its reason for plaintiff's dismissal must be reasonably specific. 450 U.S. at 258.

> has failed to rebut Whatley's *prima facie* case of discrimination, and Whatley should prevail. (I R. 83).

We agree that under the explanation on the procedural steps made in *Burdine*, 450 U.S. at 254-55,

We agree that under the explanation on the procedural steps made in *Burdine*, 450 U.S. at 254-55, decided after the trial court's ruling, it seems that there was an error in reasoning at this point when the trial court said defendant had not produced "credible" evidence to rebut the *prima facie* case and that plaintiff should prevail. This analysis seems at odds with the Supreme Court's statements in *Burdine* defining the burden of the defendant in meeting the *prima facie* case of the plaintiff: "The defendant need not persuade the court that it was actually motivated by the proffered reasons." *Burdine*, 450 U.S. at 254.

However, the trial judge foresaw this procedural problem and went on to hold alternatively that:

> Even if Skaggs had sufficiently articulated a legitimate reason, Whatley has rebutted the defense case by showing that Skaggs discriminated against him in making its decision to discharge him. (I R. 83).

Thus the ultimate burden was left on the plaintiff and the court made the critical findings for the plaintiff under the proper standard. As has been recently made clear, after the defendant failed to persuade the trial judge to dismiss for lack of a *prima facie* case, (*see* III R. 300, 303), and the defendant responded by offering evidence of the reason for the plaintiff's dismissal, the *McDonnell-Burdine* presumption actually dropped from the case and the court was in a position to decide the ultimate factual issue, as the trial judge did here. *See United States Postal Service Board of Governors v. Aikens*, ___ U.S. ___, 51 U.S.L.W. 4354, 4355. In view of the alternate finding of

the trial court for the plaintiff on the ultimate issue, with the burden properly placed on the plaintiff, there was no reversible error.

Under this proposition defendant also argues that the trial court failed completely to consider "overwhelming" evidence showing that plaintiff was dismissed for a non-discriminatory reason, citing at length the defense testimony of shortcomings by plaintiff in his work. *See* Brief of Appellant Skaggs Co., Inc., at 19-24. However, the trial judge discussed such testimony and weaknesses which he felt were apparent in it. I R. 81-82. The judge also pointed to testimony by witnesses for the plaintiff contradicting the defense evidence. I R. 82-83. We are satisfied that the trial court carefully considered all the evidence and its findings should not be set aside unless clearly erroneous, with regard being given to the opportunity of the trial court to judge the credibility of the witnesses. Rule 52(a), F.R.Civ.P. *Gutierrez v. Denver Post, Inc.*, 691 F.2d 945, 946 (10th Cir. 1982). Moreover the clearly erroneous standard applies to the ultimate findings of the trial court in a Title VII action. *Pullman-Standard v. Swint*, 50 U.S.L.W. 4425; *Verniero v. Air Force Academy District 20*, ___ F.2d ___ (10th Cir. 4/13/83).

Similarly, defendant says that the trial judge erred in not finding that the defense evidence of comparative treatment of other Hispanics rebutted any inference of disparate treatment of plaintiff, in failing to consider defendant's evidence contradicting testimony on Nay's ethnic prejudice, and in ignoring other evidence on important points. The evidence on treatment of other Hispanics was considered, but the court found it "simply not responsive." I R. 84. We agree the evidence was admissible and relevant but cannot say there was error in the findings. The weighing of all the contradictory evidence, such as is detailed at length in the Appendix to the Brief of Appellant, was for the trial judge. We are not persuaded that he erred in his consideration of the case or in his findings.

In sum the defendant has demonstrated no reversible error in the findings and analysis of the trial court.

IV

Defendant argues that the trial court erred by admitting in evidence a Determination dated January 30, 1975 by the District Director of the Equal Employment Opportunity Commission (EEOC), adverse to the company. *See* Plaintiff's Exhibit 3). More specifically, the company argues that admission of the Determination was error because it prominently reported a 1975 incident which was irrelevant to the alleged discriminatory action by the company in 1971; the use of the report in effect denied the company's right to trial *de novo* by the district court on the Title VII claim; and the Determination included inadmissible hearsay findings and conclusions by the agency.

The Determination, consisting of three typewritten single spaced pages, reported on the investigation by the District Director of plaintiff's discrimination charge. It reported on the lack of reprimands and the lack of records of any deficiency in the charging party's job performance. The report reviewed generally some facts in the employment records pertaining to good performance by the charging party and it summarized testimony from some witnesses. Further the Determination stated that substantial weight had been accorded to the state agency's findings relating to the subject charge. The Determination concluded that there was reasonable cause to believe that the respondent had violated Title VII and stated that a notice of conciliation process was enclosed.

We must agree that the admission of the evidence raises a substantial question, but are not persuaded there was any reversible error. First, the 1975 incident reported concerned an observation by an investigator of a picture

of Dr. Martin Luther King with an unusual inscription.[3] The question of admissibility due to possible remoteness and irrelevance would be a matter for the trial judge's discretion, and an abuse of discretion is not shown. Second, the argument that admission of the Determination infringed the company's right to a trial *de novo* by the court is unpersuasive. The report was not relied on in the trial judge's opinions and he independently reviewed the evidence in detail and stated his own findings and conclusions.

Third, we feel that a more serious question is theoretically involved concerning the hearsay objection. We must agree that admission of such a report with its cumulation of hearsay and observations by the investigator, and its reference to investigation by still other parties, appears to be in error. *See Cox v. Babcock and Wilcox Co.*, 471 F.2d 13, 15 (4th Cir. 1972); *Smith v. Universal Services, Inc.*, 454 F.2d 154, 160-61 (5th Cir. 1972) (Dyer, Circuit Judge, dissenting); *cf. Gillin v. Federal Paper Board Co., Inc.*, 479 F.2d 97, 99 (2d Cir. 1973). Nevertheless we find no reversible error in the admission of the exhibit. In his ruling admitting Exhibit 3 and Exhibit 12, not in question, the trial judge stated (III R. 299-300):

> I'm going to admit these two exhibits for whatever value they may have in this case, if any, but I assure you that I am concerned primarily with the evidence here under oath and I'm not going to give a whole lot of weight, if any, to somebody else's previous determinations in a case that's not heard in my court.

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[3] The picture bore an inscription "To Eldred with Love, Martin." The manager, Mr. Jensen, was asked about the authenticity of the inscription and the report says he replied that it was "phoney, kind of a joke."

The judge thus clearly showed that his interest was focused on the evidence given under oath and that he would give slight attention to the Determination. Moreover, as noted above, the two written opinions of the judge contained no reference to the report. In these circumstances we are satisfied that any error in the admission of the Determination was harmless error, not affecting the substantial rights of the company. *See* 28 U.S.C. §2111.

V

Defendant strenously objects to the order for plaintiff's reinstatement to a position equivalent to that from which he was dismissed in 1971. The company says that the plaintiff never requested reinstatement and that the court ignored his physical disability in granting such relief.

We find no merit in these contentions. The court may fashion an order in such cases to eliminate the effects of discrimination and to restore the plaintiff to the position he would have held but for the discrimination, and such equitable relief may be provided, even if it was not sought in the pleadings. *See Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980); *Sias v. City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978). Moreover the trial court did consider the facts pertaining to disability and the duties performed by plaintiff. The responsibilities of his job as lobby manager were developed on cross-examination of plaintiff by defense counsel. III R. 233-35.

The fact of his disability was stated several times in the court's findings which concluded that he currently has a partial disability. I R. 80, 87; I R. 134. The court stated that plaintiff's disabling back injury, suffered in his new strenuous physical labor, would not have occurred had defendant not terminated him as lobby manager. I R. 134 n.1.

We find no error or abuse of discretion in the relief afforded to plaintiff.

VI

Defendant next contends that the trial court erred by awarding back pay to plaintiff for any time period after his resignation from defendant's employ in June 1973. Defendant says that plaintiff then voluntarily resigned; that an award of back pay is improper because it did not constructively discharge plaintiff in that the company did not demote or transfer plaintiff in an attempt to force his resignation, citing *Muller v. United States Steel Corp.*, 509 F.2d 923, 929 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975), and *Bourque v. Powell Electrical Mfg. Co.*, 617 F.2d 61 (5th Cir. 1980); and that only during the period from plaintiff's termination as lobby to his voluntary resignation, 1971 to 1973, was plaintiff damaged by defendant's discrimination.

As the trial court found, however, this case raises no issue of constructive discharge. I R. 88. The court found that Ford's testimony established that plaintiff was terminated — fired — on September 17, 1971, as lobby manager. The only reason that plaintiff continued in defendant's employ was that he requested that defendant give him some sort of job. The trial court found that "in these circumstances, Whatley's tenure in the Skaggs warehouse has the same legal effect as if he had permanently left Skagg's employ on September 17, 1971, and had found employment elsewhere, later the same day." *Id.* We agree. Therefore, it was within the court's discretion to award plaintiff back pay for the period subsequent to June 1973.

VII

Defendant says that the trial court erred in its calculation of the award of back pay to plaintiff; that plaintiff is not entitled to back pay for the period from 1975 to 1980 when he was disabled and was not seeking employment, and that the trial court erroneously failed to

deduct plaintiff's disability benefits from its back pay liability.

Title 42 U.S.C. §2000e-5(g) leaves to the discretion of the trial court the amount of back pay to be awarded a successful plaintiff in an employment discrimination action. Absent an abuse of that discretion, the appellate court will not disturb the trial court's determination. *Comacho v. Colorado Electronic Technical College*, 590 F.2d 887, 888 (10th Cir. 1979); *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 267 (10th Cir. 1975). It is true that the statute does reduce allowable back pay awards by any amount earnable by a discharged plaintiff with reasonable diligence[6] and that the plaintiff has a duty to mitigate his damages, presumably by seeking employment elsewhere. *United States v. Lee Way Motor Freight*, 625 F.2d 918, 936-38 (10th Cir. 1979); *see Equal Employment Opportunity Commission v. Sandia Corp.*, 639 F.2d 600, 627 (10th Cir. 1980). It is also true, however, that plaintiff here worked both full and part time jobs from his 1971 dismissal by plaintiff until 1975,[7] and he was disabled from 1975 to 1980. Further, mitigation requires not success in finding alternate employment, but only a reasonable exertion to mitigate damages. *Lee Way*, 625 F.2d at 937. Under these circumstances, we find no abuse

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[6] 42 U.S.C. §2000e-5(g) provides, in part: "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."

[7] The court found that after he suffered his disability in November, 1975, plaintiff had no employment during 1976, 1977, and 1978, and substantially no employment during 1979 and 1980. (I R. 132-33). The court found no bad faith failure to mitigate damages during those years, nor did it find that plaintiff was able to secure employment "through reasonable diligence." Plaintiff continues to draw Social Security disability benefits. *See* II R. 139, X R. 19.

of discretion in the trial court's refusal to reduce defendant's back pay liability as requested.*

The trial court's refusal to deduct plaintiff's disability benefits from defendant's back pay liability is likewise not error. Such benefits are from a collateral source, and offset is not required. *See Equal Employment Opportunity Commission v. Sandia*, 639 F.2d 600, 624-26 (10th Cir. 1980); *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 736 (5th Cir. 1977).

VIII

Defendant argues that the trial court erred in holding that liability was also established under §1981. It contends that the court was in error in applying the six-year Colorado statute of limitation of C.R.S. 1973 §13-80-110 and in holding that the test for liability under §1981 was the same as for the Title VII claim involved here.

We are convinced that the district court properly rejected these same arguments in its thorough treatment of them. *See* 502 F.Supp. at 376-77. The statute of limitations issue in connection with such a §1981 claim is clearly settled in *Zuniga v. Amfac Foods, Inc.*, 580 F.2d 380 (10th Cir.), as the trial judge noted. The claim may be asserted under §1981 for such discrimination in employment and the six-year Colorado limitation was correctly

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*The trial court also expressly rejected a reduction of defendant's back pay liability based on plaintiff's disability, saying:

> Here, Whatley would not have suffered his disabling back injury had Skaggs not terminated him as lobby manager. Skaggs' act of discrimination forced Whatley from his management position to blue-collar jobs that required strenuous physical labor resulting in injury to his back.

I R. 134 n.1.

applied.[9] Moreover the type of Title VII claim upheld here was for disparate treatment. We agree with the trial judge that a successful claim for such intentional discrimination supports §1981 liability as well, in accord with the principles governing such constitutional claims noted in *Washington v. Davis*, 426 U.S. 229, 238-248. *See also T & S Service Assoc., Inc. v. Crenson*, 666 F.2d 722, 724 (1st Cir.); *McWilliams v. Escambia County School Bd.*, 658 F.2d 326, 331-32 (5th Cir.).

IX

Plaintiff asserts three claims of error regarding the trial court's calculation of back pay due him in its supplemental findings and order. First he says that the court erred by offsetting monies he earned from part-time employment from his back pay award. In determining plaintiff's back pay award, the court reduced the award by $14,329.79, the amount plaintiff had earned between 1971 and 1974, while still working full time at defendant's warehouse and then at Gold Star Beef, by "moonlighting" at Dillon Companies and then at Denver School District No. 1.

Title 42 U.S.C. §2000e-5(g) provides, "Interim earnings . . . by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." Moonlighting earnings will be considered "interim" earnings and offset against a successful plaintiff's back pay award if he would have been unable to hold the moonlighting job at the same time as the job

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[9]Plaintiff's §1981 claim is grounded on allegations of racial discrimination affecting his employment relationship and his demotion from his position as an assistant manager. This is sufficient to come within the ambit of §1981 which "affords a federal remedy against discrimination in private employment on the basis of race." *Johnson v. Railway Express Agency*, 421 U.S. 454, 460; *and see Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir.).

he lost because of discrimination. *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 454 (5th Cir. 1973).[10] The trial court properly found plaintiff's moonlighting earnings to constitute interim pay based on plaintiff's testimony both at trial and at the supplemental hearing that as lobby manager he worked ten to twelve hours a day, six or seven days a week; defendant did not require plaintiff to work more than a five day, forty hour week, but the responsibilities of his management position and the incentives of promotion and larger bonuses create the likelihood that plaintiff would have continued to work long hours had he remained a lobby manager, and he would consequently have been unable to moonlight. (*See* I R. 134; Supplemental Volume I R. 7-8).[11] The trial court's set-off was therefore not error.

Second, Plaintiff says that the trial court erred by failing to include an amount equal to his profit sharing account in defendant's profit sharing plan in his back pay award. The trial court refused such an award on the grounds that plaintiff's profit sharing rights terminated not when plaintiff was dismissed as lobby manager, but when plaintiff quit his warehouse job with defendant because of his low salary before his profit sharing rights had vested; thus, plaintiff lost his profit sharing rights by

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[10] In *Bing*, 485 F.2d at 454, the court stated:

> If a supplemental or moonlight job is one that the discriminatee cannot perform when he wins his new position, the supplemental job is necessarily temporary, provisional or "interim". By contrast, if one can hold his supplemental job and his desired full-time job simultaneously and there is reason to believe he will do so, the supplemental job assumes a permanent rather than interim nature. Those earnings would be independent of the position sought and should not be taken into account in back pay calculations.

[11] Plaintiff testified at the supplemental hearing that as a lobby manager he could have moonlighted. He admitted, however, that at no time during his tenure as lobby manager did he in fact do so. (Supplement Volume I R. 8).

voluntarily leaving his warehouse job for reasons not directly related to any act of discrimination by defendant. Further, defendant received no benefit from plaintiff's forfeited funds; plaintiff's account was merely redistributed among the accounts of other employees of defendant. (I R. 135-36).

As both the trial court and defendant recognize, monetary benefits from profit sharing plans may properly be made part of a successful plaintiff's back pay award under Title VII. *See EEOC v. Kallir, Phillips, Ross, Inc.*, 401 F.Supp. 66, 74 (S.D.N.Y. 1975), *aff'd mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977); Plaintiff-Appellant's Brief in Chief at 10. We find no error in the finding that plaintiff forfeited his profit sharing rights by resigning before they had vested. *See* Supplemental Volume I R. 57. Plaintiff and defendant stipulated to this fact. (I R. 119). In these circumstances, and in view of the trial court's broad discretion in these matters, we find no error in the court's declining to award plaintiff an amount equal to his profit sharing account with defendant.

Finally, plaintiff contends that the trial court erred by failing to award interest on the back pay award. Plaintiff argues that absent an award of interest, the high rate of inflation of the period 1971-1981 would reduce the value of the back pay award so as to thwart Title VII's purpose of making whole those discriminated against in employment.

We agree that in a proper case interest is an allowable part of a back pay award. *See United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 940 (10th Cir. 1979). Further, the purpose of Title VII is indeed to make whole the victims of unlawful employment discrimination. Title VII however, does not specifically provide for

interest on a back pay award; interest is within the discretion of the trial court.[12] Here at the supplemental hearing, plaintiff requested interest on back pay. (Supplemental Volume I R. 55). Yet, without further discussion in the record and without any mention of interest in the supplemental order fixing the amount of the back pay award, the trial court simply granted no interest. Plaintiff has requested a remand for consideration of the interest question and we feel this is proper. On remand the trial court may consider the circumstances and should make findings and a determination on the propriety of awarding interest and the proper award, if the court finds that interest should be awarded.

The plaintiff has also requested an award of attorney's fees on appeal. Since he has prevailed on most issues such an award seems proper.[13] On remand, the trial court should afford a hearing on this matter and make proper findings and an award of reasonable attorney's fees for the appeal.

Accordingly the judgment is affirmed except that the interest and appellate attorney's fee matters will be determined on remand as provided herein.

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[12] *See Goodwin v. City of Pittsburgh*, 480 F.Supp. 627, 635 n.3 (W.D. Pa.), *aff'd. without opinion*, 624 F.2d 1090 (3d Cir. 1980).

[13] *See Marks v. Prattco, Inc.*, 633 F.2d 1122, 1125-26 (5th Cir. 1981); *Lowry v. Whitaker Cable Corp.*, 472 F.2d 1210 (8th Cir. 1973).

MAY TERM — June 13, 1983

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monore G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges.

LOUIS WHATLEY,	)	
	)	
Plaintiff-Appellee, Cross-Appellant,	)	
	)	
vs.	)	Nos. 81-1303 81-1357
	)	
SKAGGS COMPANIES, INC.	)	
	)	
Defendant-Appellant Cross-Appellee	)	

This matter comes on for consideration of appellant/cross-appellee's, Skaggs Companies, Inc., petition for rehearing and suggestion for rehearing in banc in the captioned appeals.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

HOWARD K. PHILLIPS, Clerk

By Robert L. Hoecker
Chief Deputy Clerk

WHATLEY v. SKAGGS COS.

U.S. District Court,
District of Colorado

WHATLEY v. SKAGGS COMPANIES, INC., No. 76-C-449, November 25, 1980

CIVIL RIGHTS ACT OF 1964

1. National origin discrimination – Discharge – Rebuttal ► 108.1215 ► 108.7335 ► 108.8101

Employer failed to rebut discharged Mexican-American assistant store manager's prima facie case, where general testimony of district manager that assistant manager was not qualified was not supported by any credible evidence, and ethnic jokes and slurs made by district manager and assistant general manager, who had testified that assistant manager had not done his job, and assistant general manager's difficulties in dealing with minority-group members indicate that they made their recommendation to discharge assistant manager because of prejudice.

CIVIL RIGHTS ACT OF 1866

2. Intent ► 106.0642

Former employee's proof of intentional disparate treatment under Title VII of Civil Rights Act of 1964 supports imposition of liability under 42 U.S.C. §1981 as well.

CIVIL RIGHTS ACT OF 1964

3. Remedy – Reinstatement – Discharge – Back pay – Period – Measurement ► 220.405 ► 210.304 ► 210.315

Unlawfully discharged assistant store manager is entitled to reinstatement to equivalent position and to back pay from date of termination until date on which employer offers to reinstate him, with back pay based on assistant manager's salary as adjusted for cost-of-living and step increases that have occurred since discharge.

4. Remedy — Back pay — Deduction ► 210.335

Employer's back-pay liability to employee whom it unlawfully discharged will not be reduced by compensation award that he received for disability that he incurred while working for another company after discharge, since such disability award is collateral source.

5. National origin discrimination — Constructive discharge ► 108.1215

Employer's termination of Mexican-American assistant store manager was not constructive discharge, even though at time of discharge employer granted his request for employment in its warehouse; he was merely making diligent attempt to mitigate his damages by seeking reemployment in lesser capacity.

Action under 42 U.S.C. §1981 and Title VII of Civil Rights Act of 1964 by former employee against employer. Judgment for former employee.

Paul A. Baca, Denver, Colo., for plaintiff.

Earl K. Madsen (Bradley, Campbell & Carney), Golden, Colo., for defendant.

Full Text of Opinion

CARRIGAN, District Judge: — This action was filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq., as amended, and 42 U.S.C. Section 1981, the Civil Rights Act of 1870. The plaintiff, Louis Whatley, claims that he was demoted from his in-store managerial position with defendant Skaggs Companies, Inc. ("Skaggs") because of his status as a Mexican American. Skaggs is an employer within the meaning of 42 U.S.C. Section 2000e(b).

General Background.

Skaggs operates a chain of retail stores. During the time period in question, most of these stores sold prescription drugs, over-the-counter drugs, a variety of household items, and sundries. At that time, Skaggs had ten stores in its Denver district: one in Colorado Springs, two in Pueblo, and seven in the Denver metropolitan area.

Management in each of these stores consisted of a general manager, an assistant general manager, and an assistant (usually referred to as "lobby") manager. The general manager was responsible for the entire store. The assistant general manager was directly responsible for the "drug" area, which constituted the bulk of the sales floor in each store. The lobby manager was directly responsible for the candy, tobacco, and film counters which were usually located in the front of the store outside the line of cash registers where the checkout lanes ended. The stores were staffed by clerks assigned to the respective areas.

Promotions to the lowest managerial position, lobby manager, were usually made from among the clerks. From the position of lobby manager, one could be promoted to assistant general manager. General managers

were selected from the ranks of assistant general managers. Promotions sometimes occurred within the same store, but most often a promotion required transferring to another store in the Skaggs chain.

Recommendations for promotion or demotion were made by a store general manager. These were sometimes accompanied by a recommendation from the store's assistant general manager. Recommendations were always made orally: Skaggs had no formal employee evaluation procedure. Nor were there any written objective standards or tests.

The district manager forwarded recommendations from general managers, with proposed personnel changes, to the home office in Salt Lake City. During the time in question the Denver district manager was Arnold Ford. Ford testified that he consistently supported promotion recommendations made by the general managers under his supervision.

Plaintiff Whatley, an American citizen of Mexican ancestry, was first employed by Skaggs as a clerk at Store No. 22 (the "Lakeside" store) during the 1965 Christmas season. He was then approximately thirty years old.

During January, 1966, Whatley was offered, and accepted, full-time employment as a clerk in that store. The general manager at Skaggs' Lakeside store was then Gus Roe. Whatley worked through 1966 as a sales clerk in the drug area. Sometime during that year, Eldred Jensen became general manager of the Lakeside store. In late 1966 or early 1967, Whatley was involuntarily reassigned, by Jensen, to the shipping department at Lakeside.

In February 1968, Robert Benedict, general manager of the Federal store, told Jensen that he needed a shipping clerk. Jensen sent Whatley who spent the next year in the shipping department at the Federal store. In early 1969, Whatley requested and received reassignment to the sales floor.

Benedict eventually recommended Whatley to Ford for promotion. In November 1969, Whatley was named lobby manager and reassigned to the Lakeside store where Jensen was still general manager. One Skip Bailey was then assistant general manager. In April or May 1970, Bailey was replaced by Coleman Nay. Jensen and Nay worked on the Lakeside management team with Whatley until Whatley was fired as lobby manager.

Whatley's dismissal took place on Friday morning, September 17, 1971. Without any warning, Whatley was called into Jensen's office at the Lakeside store to meet with Ford and Jensen. Ford peremptorily ordered Whatley to turn over his keys, and informed him that he was no longer a lobby manager. Ford testified that his actions on this occasion terminated Whatley's employment with Skaggs.

Whatley asked why he was being fired. He was told that, in Jensen's opinion, he would never be able to handle the position of general manager of a Skaggs store. Whatley asked for reassignment to another position in the Skaggs organization, and Ford relented, sending him to work in the Skaggs central warehouse for the Denver district.

Whatley remained as a warehouseman with Skaggs until June 8, 1973, when he resigned. He gave as his reason his inability to support his family on his wages. He found part-time employment with King Soopers' Stores, and later with the Denver School District. Whatley eventually found full-time employment with Gold Star Beef Company. However, a 1975 on-the-job back injury at Gold Star resulted in his temporary total disability. Whatley currently suffers a partial disability. He now lives in Mesa, Arizona, in part for health reasons.

I. *Liability.*

A. *Title VII.*

To make out a *prima facie* case of Title VII employment discrimination, a plaintiff who has been dismissed from his job must show (1) that he is a member of a protected group, (2) that he was qualified for the position from which he was dismissed, (3) that he was removed from his position, and (4) that he was replaced by someone not a member of the protected group. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 5 FEP Cases 965 (1973). The Green rule applies where the plaintiff has been dismissed from his job. See Silberhorn v. General Iron Works Co., 584 F.2d 970, 971, 18 FEP Cases 507 (10th Cir. 1978).

After the plaintiff's *prima facie* showing, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for terminating the plaintiff. Green, supra, 411 U.S. at 802; Silberhorn, supra, 584 F.2d at 971. Plaintiff then has the opportunity to rebut this evidence.

[1] Whatley established a *prima facie* case of discrimination by evidence showing that he is of Mexican-American ancestry,[1] that he was qualified to be a lobby manager, that he was terminated, and that he was replaced by Don Bruning, a white male. The burden thus shifted to Skaggs to articulate some

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[1]Whatley is a native-born American of Mexican descent. His paternal grandfather was part English and part Indian. This accounts for his surname, which admittedly is not of Spanish derivation. His other grandparents were of Mexican ancestry. Whatley was present at counsel table throughout the trial, and testified in his case-in-chief and in rebuttal. Whattley's physical characteristics are such that a reasonable person should recognize that Whatley is of Mexican ancestry. Skaggs did not contest the issue of Whatley's national original at trial.

legitimate, nondiscriminatory reason for Whatley's termination as lobby manager.

In an attempt to articulate a reason for Whatley's dismissal, Skaggs presented the testimony of Ford, Nay, and Jensen. All three participated in some way in the decision to terminate Whatley. Nay and Jensen both told Ford that Whatley was not performing well enough as lobby manager to continue in the management of a Skaggs store. Based on their opinions, Ford recommended Whatley's termination to his superiors in the Skaggs organization. With his superiors' approval, Ford dismissed Whatley.

It was uncontroverted that Jensen's recommendation was the critical factor in the decision to terminate Whatley: Ford's practice was to base his personnel recommendations to Skaggs management almost entirely upon the recommendation of the general manager with direct supervision of the employee involved. Jensen was questioned repeatedly at trial about the basis for his opinion that Whatley was not qualified to continue as lobby manager. Invariably, his response was in terms of the generality that Whatley did not have good business sense. When asked what facts about Whatley gave rise to this conclusion, Jensen confessed that it was a "gut reaction."

Jenson did testify that he recalled one or two complaints from customers about Whatley, that Whatley had trouble covering shortages of products specially advertised during a particular week, and that Whatley had trouble scheduling the work of employees under his supervision. However, Jensen's overall recollection during direct and cross-examination was poor. This, coupled with the fact that Whatley offered evidence contradicting each of Jensen's recollections, undermined the credibility of Jensen's testimony as to particular events. His bald conclusion that Whatley lacked good business sense, therefore, is unsupported by any credible evidence.

It is questionable whether, standing alone, Jensen's highly subjective reason for recommending that Whatley be dismissed constitutes a sufficient articulation of a legitimate, nondiscriminatory reason to rebut Whatley's *prima facie* case of discrimination. Nay was also present at the Lakeside store on a daily basis, and had ample opportunity to observe Whatley's job performance. It is uncertain how much weight Nay's negative impression of this performance carried in the decision to remove Whatley. However, Nay's testimony can at least be treated as an attempt to articulate the reasons for Whatley's dismissal.

Nay is a fifteen-year employee of Skaggs. At the time of trial, Nay was assistant general manager of a Skaggs store in Great Falls, Montana. He held a like position at Lakeside when he worked with Whatley.

The essence of Nay's testimony was that Whatley simply did not do his job. Nay testified that Whatley was unable to prepare displays of merchandise for promotional sales, unable to execute efficiently his daily ordering and pricing responsibilities, and unable to schedule the employees assigned to his department. In addition, Nay testified that Whatley was slow in bringing his merchandise up from the store room, and that Whatley failed to prepare adequately for the quarterly inventory. Nay testified that on several occasions he had to leave his duties in the drug area and assist Whatley in performing tasks that Whatley should have handled on his own.

Jesen's recollection of these events was so vague that he could not corroborate Nay's testimony. Skaggs did offer the testimony of Kathy Romero Parker, who worked for Whatley in the lobby department for a year. Mrs. Parker testified that she often had to work alone as the lobby cashier, though she admitted that Whatley was in the store and available to help her when necessary.

Whatley offered testimony to contradict Nay, as well as testimony to impeach Nay's credibility. Whatley

testified that one of the first things he did when he arrived at Lakeside after his promotion was to clean the old displays, build new ones, and paint the lobby area fixtures. It was uncontradicted that Skaggs' policy was to give its lobby managers authority over ordering and pricing of goods, as well as scheduling the employees in the department. This authority was subject to the general manager's power to modify the lobby manager's decisions. One of Whatley's chief contentions throughout his case was that Jensen constantly modified his orders and prices, and that this effectively deprived him of any chance fully to carry out his responsibilities as lobby manager. Whatley's testimony supported this contention.

In addition to contradicting Nay's testimony by his own, Whatley offered the testimony of Howard Juross and Debbie Adams. Both of these witnesses worked at Lakeside in the lobby department while Whatley was lobby manager. Both testified that they had a good work relationship with Whatley, and that his work in the department was done in a satisfactory manner.

Since Whatley's and Skagg's evidence on these issues is in direct contradiction, their resolution turns on credibility. Skaggs devoted most of its efforts at impeachment to contradiction. The Court finds that Skagg's other attempts to impeach Whatley's witnesses with deposition testimony and EEOC affidavits failed of its purpose. The inconsistencies uncovered by Skaggs were insubstantial and almost imperceptible.

Whatley, however, offered evidence that both Jensen and Nay had made prior inconsistent statements. The most telling evidence of this kind related to ethnic jokes and slurs uttered by both Jensen and Nay. These will be discussed more fully below. (see footnotes 2, 3, and 5). For the purposes of evaluating their credibility, it is sufficient to say that both Jensen and Nay denied making certain jokes and insults when they were cross-examined. Whatley confronted these witnesses with the

specific content of the alleged jokes and insults, then offered testimony by himself or Juross that such remarks had been made. From this evidence, the Court finds as a fact that the testimony offered by Skaggs purporting to establish a legitimate, nondiscriminatory reason for Whatley's dismissal is not credible.

The defendant's burden in a Title VII Case to rebut a *prima facie* case of discrimination is not heavy. Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25, 18 FEP Cases 520 (1978); Silberhorn v. General Iron Works Co., 584 F.2d 970, 971, 18 FEP Cases 507 (10th Cir. 1978). However, to carry its burden the defendant must present evidence that is at least credible. Since Skaggs has not presented credible evidence, it has not articulated any legitimate, nondiscriminatory reason for dismissing Mr. Whatley. Therefore Skaggs has failed to rebut Whatley's *prima facie* case of discrimination, and Whatley should prevail.

Even if Skaggs had sufficiently articulated a legitimate reason, Whatley has rebutted the defense case by showing that Skaggs discriminated against him in making its decision to discharge him.

As a major aspect of its defense, Skaggs paraded numerous Spanish surnamed male employees into court to testify that they had encountered no discrimination in seeking promotions to managerial positions. These employees testified under the watchful eye of a Skaggs home office executive who sat at defense counsel table throughout the trial. The cumulative effect of their evidence established that Skaggs has no company-wide policy or practice of discriminating against this minority group. This provides little comfort to Whatley, however, for it appears that discrimination played a major part in his firing-demotion. Whatley did not complain of a company-wide policy of discrimination by Skaggs, and thus the Skaggs evidence is simply not responsive.

Whatley proved that both Jensen and Nay used the term "nigger" to refer to Black people,[2] that both Jensen and Nay made ethnic jokes and slurs, some of which were directed at Whatley or his wife,[3] and that Nay had a history of problems with members of minority groups, both employees and customers.[4]

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[2]Jensen used the term in at least one joke, set forth in note 3, below. Whatley testified that Jensen also used the term in asking Whatley if the wife of another employee was a "nigger." This occurred when Whatley was still a clerk at the Lakeside store. Nay apparently used the term "nigger" regularly to refer to a Black person. Juross testified that both Jensen and Nay each used the term "nigger" at least ten times a year.

[3]It was the testimony of Juross that Jensen once said that every store should have at least one "nigger" to "keep and eye on the others." This statement was allegedly made in Jensen's office. Whatley testified that Nay made several ethnic jokes or slurs. Once, Nay asked Whatley what the difference was between a "Mexican" and a "nigger." Whatley's "I don't know" brought the punchline: "Their hair." Whatley once bought a birthday cake for his daughter. The baker had decorated the cake with the figure of a gingerbread man. Upon seeing the cake, Nay said, "Perfect for a little Mexican baby." This testimony was corroborated by Juross. Whatley's daughter once babysat for Nay; when bringing the girl home on this occasion, Whatley invited Nay into the Whatley home. Whatley testified that Nay said, "You have a nice house for a Mexican." Whatley also testified that Nay once inquired of Whatley if his wife was a "nigger." Nay did not confine his remarks to Blacks and Hispanics. Juross testified the Nay once told him, "If you don't work faster, we're going to turn up the ovens." Juross is Jewish.

[4]Whatley testified that Nay once chased a 10-12 year old male Mexican shoplifter out of the store, grabbed him, and began to twist his arm. Nay's response to Whatley's protest was: "Butt out, Lou. I can't stand these Mexican punks." Nay admitted that two other complaints of discrimination had been filed against him, one by a Black man and one by an Hispanic.

Jensen and Nay contested this evidence either in whole or in part.[5] Thus resolution of the issue turned on credibility. The Court finds that Jensen and Nay did make the remarks charged and that Nay did have difficulties in dealing with members of minority groups. From these facts, the Court infers that, absent any other credible explanation, Jensen and Nay made their recommendations that Whatley be dismissed as a result of their prejudice against Whatley because he is a Mexican-American.

This inference of discrimination is buttressed by the circumstances in which Whatley was fired. It would be difficult to imagine a less considerate, more thoughtless, harsh or abrupt manner of dealing with a long term supervisory employee. Neither Jensen nor Nay took the time to discuss with Whatley the alleged deficiencies in his performance which they now assert were responsible for his dismissal. Nor did any of Skaggs' officers or supervisory employees give Whatley any warning that his position was in jeopardy. It seems highly unlikely that if Whatley's job performance had been so inadequate for so long as claimed, he would not have received a reprimand, warning or counseling on how to improve. Rather this Court finds that Skaggs' claims of deficien-

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[5]Jensen categorically denied ever using the term "nigger" to refer to anyone in his life, and denied making any of the remarks attributed to him by plaintiff's witnesses. However, Jensen did admit to keeping a picture of Martin Luther King, Jr. in his office for a year. The picture had been sent to him, with the inscription "To Eldred, with love." The picture had not been sent by Dr. King, since Jensen received it several years after King's death.

Nay admitted that he used the term "nigger" to refer to Blacks, and that he made regular use of ethnic "humor." He also admitted making the "ovens" remark to Juross that is described in note 2 above. He admitted that he probably made ethnic jokes to Whatley, but denied making the joke about hair as the only distinguishing features between "niggers" and "Mexicans," and denied making disparaging remarks about plaintiff's wife or their home. Nay denied any recollection of the incident with the birthday cake.

cies in Whatley's job performance were merely pretextual. The testimony of several Skaggs employees established that warnings were normal procedure. These witnesses were managers all called by Skaggs.

The Court finds and concludes that Whatley has proved his case of discriminatory job termination, and has established liability under Title VII.

B. *Section 1981.*

Skaggs has contended since it filed its answer that Whatley's Section 1981 claim is barred by the statute of limitations. Whatley filed his discrimination complaint with the EEOC on September 29, 1971. The EEOC issued a right-to-sue letter on January 27, 1976. Whatley filed this suit on April 23, 1976. His Title VII claim, which had to be filed within ninety days after receipt of the EEOC right-to-sue letter, was timely filed. See Plunkett v. Roadway Express, Inc., 504 F.2d 417, 8 FEP Cases 817 (10th Cir. 1974).

Whatley filed his Section 1981 claim with his Title VII claim on April 23, 1976. His section 1981 claim arose with his termination on September 17, 1971, four years and seven months before he filed his claim. Since a six-year limitations period is applied to Section 1981 claims of employment discrimination that arise in Colorado, his Section 1981 claim was timely filed. See Zuniga v. AMFAC Foods, Inc., 580 F.2d 380, 387, 17 FEP Cases 1195 (10th Cir. 1978).

It is clear that a plaintiff may state a claim for relief under 42 U.S.C. §1981 for acts of discrimination directed against him because he is a Mexican-American. Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 971, 19 FEP Cases 191 (10th Cir. 1979). Discrimination actionable under Section 1981 may occur in the employment context. Johnson v. Railway Express Agency, 421 U.S. 454, 459-60, 10 FEP Cases 817 (1975), Section 1981 provides a basis for relief independent from Title VII. Id. at 461.

The difference between the discriminatory intent required to recover under Section 1981 and that required to recover under Title VII is not clear. See Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 971, 19 FEP Cases 191 (10th Cir. 1979). A greater showing of discriminatory intent seems to be required for "constitutional" claims of discrimination than is required for Title VII claims. Id. This is so because some Title VII cases do not require a showing by the plaintiff that the defendant employer purposely discriminated against him. See Washington v. Davis, 426 U.S. 229, 238, 12 FEP Cases 1415 (1976).

However, Title VII does not require proof of discriminatory intent only when the suit is one for "adverse impact." See Griggs v. Duke Power Co., 401 U.S. 424, 3 FEP Cases 175 (1971). Title VII imposes liability for "adverse impact" when an employer uses some decision-making device that is neutral on its face, but adversely affects the employment of a particular protected group. "Disparate treatment" cases, on the other hand, follow the evidentiary rule of McDonnel-Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973). From an examination of the shifting burdens suggested by Green for "disparate treatment" cases, it is apparent that these cases turn on a finding of intentional discrimination. Therefore, the showing of discriminatory intent required to establish Title VII liability under Green differs only slightly, if at all, from the showing required to establish Section 1981 liability.

[2] Whatley tried and proved his case under Title VII on theory of "disparate treatment." This Court applied the Green rule, and found intentional discrimination from the facts discussed above. This finding supports imposition of Section 1981 liability as well. Therefore, Whatley's proof establishes Section 1981 liability in addition to Title VII liability.

II. *Remedies*

Whatley was terminated from his position as lobby manager at the Lakeside store on September 17, 1971. Since that termination was an act of intentional discrimination against him because of his national origin, he is entitled to reinstatement to an equivalent position with Skaggs. 42 U.S.C. §2000e-5(g). Whatley cannot be reinstated to the position he formerly held at Lakeside because Skaggs closed its Lakeside store several years ago.

Whatley is also entitled to back pay. The period for which back pay is recoverable commences on September 17, 1971, the date of his termination. Since Whatley filed his charge of discrimination with the EEOC on September 20, 1971, this is well within the statutory limit restricting back pay liability to two years prior to the filing of the charge with the EEOC. See 42 U.S.C. §2000e-5(g).

[3] Skaggs' liability for back pay will terminate on the date Skaggs offers to reinstate Whatley. See United States v. Lee Way Motor Freight, Inc. 625 F.2d 918, 931-32, 20 FEP Cases 1345 (10th Cir. 1979); Schlei and Grossman, *Employment Discrimination Law* 1240 (1976). The back pay award will be based on the salary for an assistant or lobby manager with Skaggs. This amount is to be adjusted for cost-of-living and step increases which have occurred since September 17, 1971. The back pay award is to be reduced by Whatley's earnings during the back pay period, including the amount earned by Whatley while employed in Skaggs' warehouse.

[4] However, the back pay award will not be reduced by Whatley's compensation award for the disability he incurred while working at Gold Star Beef Company. There might be justification for reducing the award by this amount if Whatley had been in Skaggs' employ when the disability occurred, since Skaggs would have

paid premiums for disability insurance. See Equal Employment Opportunity Commission v. Sandia Corp., 639 F.2d 600, at 625-626, 23 FEP Cases 799 (10th Cir. 1980).

However, a disability award received as a result of an injury while Whatley was working for another employer is a collateral source. Id. at 625. In Sandia, the Tenth Circuit affirmed the District Court's refusal to allow a set-off of unemployment benefits against a back-pay award. A *fortiori*, set-off of a disability award cannot be allowed, since it is compensation for an injury entirely different from the loss of employment "cured" by a back-pay award.

[5] Skaggs has raised the issue of constructive discharge. This is not a constructive discharge case. A "constructive discharge" is an act of demotion or transfer designed to force an employee to resign. See Muller v. United States Steel Corp., 509 F.2d 923, 10 FEP Cases 323 (10th Cir. 1975). Whatley was terminated-fired on September 17, 1971 as lobby manager. The testimony of Arnold Ford, the Skaggs employee who terminated Whatley, establishes this. The only reason Whatley continued in Skaggs' employ was his request for some sort of job in the Skaggs organization. He was merely making a diligent attempt to mitigate his damages by seeking reemployment in a lesser capacity. In these circumstances, Whatley's tenure in the Skaggs warehouse has the same legal effect as if he had permanently left Skaggs' employ on September 17, 1971, and had found employment elsewhere, later that same day.

Whatley is entitled to reasonable attorney's fees as a prevailing party in a civil action to enforce the provisions of Title VII. See 42 U.S.C. §2000e-5(k). He is also entitled to reasonable attorney's fees as the prevailing party in a civil action to enforce the provisions of Section 1981. See 42 U.S.C. §1988. He is not, however, entitled to a double recovery of attorney's fees. As the prevailing party, Whatley is also entitled to recover his costs.

Accordingly, it is

ORDERED that the Clerk enter judgment for the plaintiff on his claims under Title VII, 42 U.S.C. §2000e-5, and the Civil rights Act of 1870, 42 U.S.C. §1981. The plaintiff must file his claim for attorney's fees within twenty days from the entry of this Order. The defendant may file its objections within ten days after this claim is filed. A hearing wil be set upon request of counsel.

FURTHER ORDERED that the parties confer within twenty days following the date of this Order in an attempt to reach an agreement on the proper amount of the back pay award. If no agreement can be reached, the Court will consider appropriate motions as soon as they can be heard on a short notice, priority basis. The Clerk shall withhold entry of final judgment until after the awards of attorney's fees and back pay are determined.

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WHATLEY v. SKAGGS COS.

U.S. District Court,
District of Colorado

WHATLEY v. SKAGGS COMPANIES, INC. No. 76-C-449, February 23, 1981

CIVIL RIGHTS ACTS OF 1986 AND 1964

1. Remedy — Back pay — Moonlight earnings ► 210.3655

Employer that unlawfully terminated assistant store manager but then reemployed him as warehouse worker is entitled to offset his "moonlighting" earnings while employed as warehouse worker, where he testified that he worked 10 to 12 hours a day six or seven days a week as assistant manager, and while he testified that employer did not require him to work more than eight-hour day or more than five days a week, responsibilities of his position and incentives of faster promotion and larger bonuses render it more likely than not that he would have continued to work long hours had he remained assistant manager, thus rendering him unable to moonlight.

2. Remedy — Back pay — Moonlight earnings ► 210.3655

Employer that unlawfully terminated employee is not entitled to offset money that he earned while helping his wife, where these earnings reflect work that he easily could have performed in spare time, on occasional basis, to help family business.

APPENDIX C

3. Remedy — Back-pay period ► 210.304

Period for which former management employee may obtain back pay for his unlawful discha·ge by employer includes years during which he was disabled as result of back injury suffered in job with another company, where he would not have suffered injury had employer not teminated him as assistant store manager and forced him into blue-collar jobs requiring strenuous physical labor.

4. Remedy — Back pay — Deduction ► 210.3651

Employer that unlawfully terminated employee is not entitled to offset against back-pay award monthly payments that he received from sale of duplex in which he lived, despite employee's statement that he is in real estate business, where payments constitute proceeds from sale of personal residence.

5. Remedy — Profit-sharing benefits ►225.501

Former employee who immediately was employed by employer in warehouse following his unlawful termination as assistant store manager and who subsequently quit his warehouse job voluntarily before his profit-sharing rights had vested is not entitled to be compensated for profit-sharing benefits he lost when he left employer's employ.

Proceeding to determine back pay following 27 FEP Cases 452, 502 F.Supp. 370. Back pay determined.
Paul A. Baca, Denver, Colo., for plaintiff.
Earl K. Madsen, Golden, Colo. for defandant.

Full Text of Opinion

CARRIGAN, District Judge: — THIS MATTER is before the Court for determination of the proper amount of back pay and attorney's fees to be awarded the plaintiff, Louis Whatley. Whatley prevailed against the defendant Skaggs Companies, Inc., on claims of employment discrimination brought under Title VII, 42 U.S.C. §§2000e, et seq., as amended, and the Civil Rights Act of 1870, 42 U.S.C. §1981. See this Court's Opinion filed November, 25, 1980. At the parties' request, a hearing on these questions was held and additional evidence was received.

1. *Specific Findings and Conclusions*

Skaggs intends to appeal from this Court's finding that Skaggs is liable to Whatley for employment discrimination. Subject to that reservation, the parties have stipulated that Whatley is entitled to $5,115.00 in attorney's fees.

The parties also have stipulated that, had Whatley remained with Skaggs as a lobby manager, his additional earnings during the time at issue would have totaled $118,169.53. This figure reflects an offset for Whatley's earnings at Skaggs' warehouse from September, 1971, to June, 1973. The parties agree that Skaggs is entitled to offset an additional $14,603.59 because of Whatley's full-time employment earnings at Gold Star Beef Company and at AC&S, Inc. during 1974 and 1975.

The parties disagree, however, on whether Skaggs may offset Whatley's part-time, "moonlight" earnings during 1971 through 1974 and his earnings from self-employment during 1975, 1979, and 1980. The parties also disagree on whether Whatley is entitled to have an amount equal to what he would have received through Skaggs' profit-sharing plan included in his back pay award.

The rule on "moonlighting" earnings is best stated in Bing v. Roadway Express, Inc., 485 F.2d 441, 454, 6 FEP Cases 677 (5th Cir. 1973). A plaintiff's "moonlighting" earnings will be offset against his back pay award if he would have been unable to hold the "moonlighting" job simultaneously with the job he lost because of discrimination.

[1] Whatley testified, both at trial and at the post-trial back pay hearing, that as lobby manager he worked ten to twelve hours a day, six or seven days a week. Although he testified at the hearing that Skaggs did not *require* him to work more than an eight-hour day, or more than five days a week, the responsibilities of his management position and the incentives of faster promotion and larger bonuses render it more likely than not that Whatley would have continued to work long hours had he remained a lobby manager. Therefore he would not have been able to "moonlight." Consequently, Skaggs is entitled to offset $14,329.79 because of Whatley's "moonlighting" earnings at the Dillon Companies and School District No. 1 during 1971-74.

[2] Skaggs is not, however, entitled to offset Whatley's self-employment earnings in 1975, 1979, and 1980. In 1975, Whatley earned $732.77 while helping his wife operate her business. These earnings reflect work he easily could have performed in spare time, on an occasional basis, to help the family business. Such earnings should not be offset. See Buck v. Board of Education, 10 E.P.D. ¶10,363, 27 FEP Cases 461 (E.D.N.Y.1975).

[3] Whatley suffered a disability in November, 1975, and did not work at all during 1976, 1977, or 1978.[1] In 1979, Whatley again was able, occasionally, to help his wife with her business, but he drew no wages. Effectively, he was still disabled, and Skaggs is not entitled to an offset for this year.

[4] The Whatleys purchased a duplex in Denver in 1959. Whatley and his immediate family lived in one unit, and his wife's parents lived rent-free in the other unit. In February, 1980, the Whatleys, with Mrs. Whatley's parents, moved to Mesa, Arizona. They sold their duplex on an installment sale contract, retaining title until fully paid. The Whatleys receive $830.00 per month pursuant to this contract. Skaggs claims that the amounts received from this arrangement should be offset since Whatley testified at his deposition in July, 1980 that he was "in the real estate business."

Mr. Whatley clarified this statement at the back pay hearing. Mr. Whatley owns no income property other than the Denver duplex. He is not in the busines of buying and selling real estate, and he has never been licensed as a realtor or broker. Whatley explained that he has sometimes described himself as being "in the real estate business" to avoid the embarrassment and stigma of admitting that he is unemployed at age forty-five with no obvious disability. The Court finds as a fact that the monthly payments from the land contract on the Denver duplex constitute proceeds from the sale of Whatley's personal residence. These payments are not earnings

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[1]Although an argument might be made that Whatley should receive no back pay during the time he was disabled, see Taylor v. Safeway Stores, Inc., 524 F.2d 263, 267-68, 11 FEP Cases 449 (10th Cir. 1975), the facts do not justify the application of that rule in this case. Here, Whatley would not have suffered his disabling back injury had Skaggs not terminated him as lobby manager. Skaggs' act of discrimination forced Whatley from his management position into blue-collar jobs that required strenuous physical labor resulting in injury to his back.

within the meaning of Title VII, 42 U.S.C. §2000e-5(g). Hence Skaggs is not entitled to any offset for these payments.

Finally, Whatley claims that $5,997.75 should be added to his back pay award to compensate him for the profit-sharing benefits he lost when he left Skaggs. A back pay award may include "profit sharing ... to which plaintiff would have been entitled had [he] been continued in [his] employment." EEOC v. Kallir, Phillips, Ross, Inc., 401 F.Supp. 66, 74, 11 FEP Cases 241 (S.D. N.Y.1975), aff'd mem., 559 F.2d 1203, 15 FEP Cases 1369 (2d Cir.), cert. denied, 434 U.S. 920, 15 FEP Cases 1618 (1977).

[5] In this case, however, Whatley immediately reentered Skaggs' employ after he was terminated as a lobby manager, and his profit-sharing rights were not terminated when he was ousted as lobby manager. Rather, those rights continued until he voluntarily quit his warehouse job before his profit sharing had vested. This Court has already found that Whatley's dismissal as lobby manager in September, 1971, was a termination, and that his employment at the warehouse had the same legal effect as a new job. Whatley left that warehouse job voluntarily for reasons not directly related to any act of discrimination by Skaggs, and, by leaving, lost his profit-sharing rights. Although Whatley forfeited the funds previously credited to his profit-sharing account by resigning before the six-year vesting period, that forfeiture did not inure to Skaggs' benefit. Whatley's account is merely redistributed to the accounts held for the other plan participants.

For these reasons, Whatley is not entitled to have an amount equal to his profit-sharing account included in his back pay award.

Accordingly,

IT IS ORDERED that judgment be entered for the plaintiff and against the defendant in the amount of $89,236.15. Plaintiff is entitled to costs.

IT IS FURTHER ORDERED that the defendant pay Paul A. Baca $5,115.00 in attorney's fees.

§ 2000e-2(e). Discrimination because of race, color, religion, sex, or national origin

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate aganist any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversly affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

APPENDIX D

§ 2000e-2(j). Preferential treatment not required on account of numerical or percentage imbalance.

Nothing contained in this title [42 USCS §§ 2000e et seq.] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title [42 USCS §§ 2000e et seq.] to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 USCS § 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Office-Supreme Court, U.S.
FILED
OCT 11 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-402

In The
Supreme Court of the United States
October Term, 1983

SKAGGS COMPANIES, INC.,

Petitioner,

vs.

LOUIS WHATLEY,

Respondent.

BRIEF IN OPPOSITION TO THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PAUL A. BACA
303 West Colfax Avenue
Suite 950
Denver, Colorado 80204
(303) 825-8594

Attorney for Respondent

CRAKE PRINTING CO., 2111 Douglas St., Omaha 68102

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals' affirmance of the finding that the employment discrimination claimant continued to accrue backpay even after the claimant's subsequent voluntary resignation from employment is consistent with this Court's decision in *Ford Motor Company v. Equal Employment Opportunity Commission*, — U. S. —, 102 S. Ct. —, 73 L. Ed. 2d 721 (1982), decisions of other panels of the same Court of Appeals, and decisions of other Federal Courts of Appeal.

2. Whether the Court of Appeals' affirmance of the finding that the employment discrimination claimant continues to accrue backpay after the claimant's voluntary resignation and while the claimant was unavailable for work and disabled due to disability incurred while working for a subsequent employer voluntarily chosen by claimant, is consistent with this Court's decision in *Ford Motor Company v. Equal Employment Opportunity Commission*, *supra*, decisions of other federal Courts of Appeals, and with the remedial standards of Title VII.

3. Whether disability payments in a workmen's compensation settlement received by the employment discrimination claimant for disability incurred while working for a subsequent employer after claimant's voluntary resignation should be deducted from or offset against the employer's backpay liability.

LIST OF PARTIES

1. The Petitioner is Skaggs Companies, Inc., a Delaware corporation with its principal place of business in Salt Lake City, Utah.

2. The Respondent is Louis Whatley of Mesa, Arizona.

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No. 83-402

In The
Supreme Court of the United States
October Term, 1983

SKAGGS COMPANIES, INC.,
Petitioner,
vs.
LOUIS WHATLEY,
Respondent.

BRIEF IN OPPOSITION TO THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Louis Whatley hereby respectfully submits his Brief in Opposition to the Petition of Skaggs Companies, Inc. requesting a Writ of Certiorari to review the decision in this action rendered by the United States Court of Appeals for the Tenth Circuit and requests that this Court deny the petition.

STATEMENT OF THE CASE

This case arises under Title VII, 42 U. S. C. § 2000e *et seq.* of the Civil Rights Act of 1964 with additional claims based on the Civil Rights Act of 1886, 42 U. S. C. § 1981. The claimant, Louis Whatley, brought this action against Skaggs alleging that it discriminated against him because of his Hispanic national origin when it removed him from his position as lobby manager in September, 1971 in violation of Title VII, 42 U. S. C. § 2000e *et seq.* and 42 U. S. C. § 1981. The District Court found that the removal of Mr. Whatley from his position of lobby manager was in violation of these Acts. The Court of Appeals for the Tenth Circuit affirmed the decision and all back-pay findings and conclusions of the District Court.

The claimant was first employed by Skaggs on August 28, 1965 as a part-time employee, and later became a full-time employee and held several positions in retail stores of Skaggs located in the Denver metropolitan area. On November 7, 1969, Whatley was promoted to the position of lobby manager at the Skaggs Lakeside store, Store 22, and remained in that capacity through September 16, 1971.

On September 17, 1971, Whatley was terminated from that position and rehired that same day as a warehouseman and assigned to the Denver Warehouse as a clerk and remained in that capacity through June 8, 1973 when he resigned his employment with Skaggs. From the date of his resignation to November, 1975 the claimant held several jobs with various employers other than Skaggs. In November, 1975 the claimant sustained a disabling back injury while working as a "beef lugger" for Gold Star Beef Co. located in Denver, Colorado. From the date of

his injury to the date of trial, the only employment held by the claimant was the minimal assistance which he provided to his wife in the operation of a family owned billiard hall. The only year in which the claimant received any remuneration for this assistance at the billiard hall was 1975.

On November 25, 1980, the District Court issued its decision regarding the liability phase of this proceeding and held Skaggs in violation of the claimant's rights under 42 U. S. C. § 1981 as well as 42 U. S. C. § 2000e, *et seq.* (See Appendix B of the Petition.) On February 23, 1981, the District Court issued its decision regarding the remedy phase of this proceeding. (See Appendix C of Petition.) On May 9, 1983 the United States Court of Appeals for the Tenth Circuit affirmed the decisions of the District Court regarding both liability and remedy and ordered the matter remanded to the District Court on the issue of prejudgment interest on the claimant's backpay award and the attorney's fees for claimant's counsel efforts on the appeal. (See Appendix A of Petition.) On June 13, 1983 the Court of Appeals for the Tenth Circuit denied the Petitioner's request for rehearing.

REASONS FOR DENYING THE WRIT

I.

The decision of the Court below is not in conflict with the decision of this Court in Ford Motor Co. v. Equal Employment Opportunity Commission, other decisions of the Tenth Circuit or decisions of other circuits.

Ford Motor Co. v. Equal Employment Opportunity Commission.

In its "conflict" argument Skaggs argues initially that the decision of the Court below is at odds with the principles set forth by this Court in *Ford Motor Co. v. Equal Employment Opportunity Commission*, — U. S. —, 102 S. Ct. —, 73 L. Ed. 2d 721 (1982). The Respondent submits that Skaggs' argument of attempting to apply the principles set forth in *Ford Motor Co. v. EEOC, supra*, is misplaced and totally inapplicable to the facts here.

Ford Motor Co. v. EEOC, supra, stands for the proposition that an employer charged with discrimination in hiring under Title VII of the Civil Rights Act of 1964 can toll the continuing accrual of backpay liability under § 706 (g) of Title VII by unconditionally offering the claimant the job previously denied, and is not required to offer seniority retroactive to the date of the alleged discrimination. The obvious distinguishing feature of that case with the case here is that the former involves a discriminatory failure to hire while the latter involves a discriminatory termination. In *Ford Motor Co. v. EEOC, supra*, the claimants were discriminatorily denied employment and subsequently refused offers of employment by the discriminating employer to the position originally sought because they received offers of employment to more attractive positions from another employer which they accepted prior to the offers extended by the discriminating employer. Their refusal to the offers of employment from the discriminating employer, in this Court's opinion, tolled that employer's liability for backpay from the date of the refusals. At page 8 of its Petition, Skaggs states that the claimants in *Ford Motor Co. v. EEOC*, "lost their jobs

and then obtained a better job with another employer". To begin with, the claimants there never were hired by the discriminating employer initially and the question before the Court was simply whether or not a subsequent offer of employment and the claimants' refusal terminated the employer's liability for backpay. The facts in that case do not square with the facts here. Whatley was terminated from his position as lobby manager on September 17, 1971, was re-hired by Skaggs as warehouseman at a substantially lower rate of pay on that same date and resigned his warehouseman position on June 8, 1973 to accept a job which had a higher rate of pay. The representation by Skaggs at page 9 of its Petition that Whatley voluntarily resigned his position and then a year or more later accepted a position with another employer is simply not correct. Whatley was employed at all times subsequent to his resignation up to the date of his injury in November, 1975. Whatley's voluntary resignation and subsequent acceptance of higher paying jobs is consistent with his duty to mitigate his damages. There is no requirement that victim of discrimination remain in the employ of the discriminating employer at a low paying job when he can seek employment elsewhere at a higher paying job. To remain in the employ of the discriminating employer in such an instance would, in fact, be a violation of his duty to mitigate his damages in a diligent manner. A claimant such as Whatley is under no duty to "seek employment which is not consonant with his particular skills, background and experience" or "which involves conditions that are substantially more onerous than his previous position." See *NLRB v. The Madison Courier, Inc.*, 472 F. 2d 1307 (D. C. Cir. 1972). Whatley did seek and obtained more onerous and strenuous employment in

order to make more money than a Skaggs' warehouseman. This effort on his part completely fulfilled his duty to mitigate his damages. If Whatley had voluntarily resigned his employment and sat on his "duff" then Skaggs' argument would indeed have merit. Additionally, the fact that Whatley accepted a less prestigious job as a Skaggs warehouseman is indicative of his predisposition to diligently mitigate his damages to the fullest extent possible. He was under no obligation to accept the warehouseman position. See *Merriweather v. Hercules, Inc.*, 631 F. 2d 1161 (5th Cir. 1980).

This Court's holding in *Ford Motor Co. v. EEOC, supra*, has no application to the facts here and the decision of the Court below is, in no way, in conflict with it.

Decisions of the Tenth and Other Circuits

In its "conflict" argument, Skaggs also argues that the decision of the Court below is in conflict with other decisions of that circuit as well as decisions of other circuits. Skaggs argues that the decision below is in conflict with the decisions of the Tenth Circuit cases of *Taylor v. Safeway Stores, Inc.*, 524 F. 2d 263 (10th Cir. 1975) and *Muller v. U. S. Steel Corp.*, 509 F. 2d 923 (10th Cir. 1975).

In *Taylor v. Safeway Stores, Inc., supra*, the claimant voluntarily took himself out of the job market by attending college on a full time basis in an effort to achieve higher aspirations. This case has absolutely no application to the case here. Whatley did not take himself out of the job market but instead expanded his employability by seeking more onerous positions, but higher paying positions than the job he voluntarily quit.

In dicta in *Taylor v. Safeway Stores, Inc., supra,* the Court surmised that if a discharged claimant accepts employment elsewhere that acceptance of other employment would "cut off any backpay award". It is obvious from the Court's further discussion of a "double" award that the accepted employment must be at a comparable salary when compared to the job which is the subject matter of the discrimination claim. Whatley was fired from position of lobby manager and rehired the same date as a warehouseman at a substantially lesser salary. His resignation was from the warehouseman position *not* the lobby manager position.

The case of *Muller v. United States Steel Corp., supra,* is also distinguishable from the facts here. That case involved the issue of constructive discharge. There is no such issue here as the trial court made a specific finding that Whatley was terminated from his position of lobby manager on September 17, 1971. His acceptance of the position of warehouseman on the same day had the same legal effect of his being terminated by Skaggs and then obtaining work elsewhere on the same date. Had the trial court found that Whatley was demoted and subsequently constructively discharged, Skaggs' argument would have merit. The case here is not one of constructive discharge but one of actual termination.

In addition to the cases of *Muller v. United States Steel Corp., supra,* and *Taylor v. Safeway Stores, Inc., supra,* discussed above, Skaggs argues that the decision of the Court below is in conflict with the Courts of Appeals decisions in *Bourque v. Powell Electrical Manufacturing Company,* 617 F. 2d 61 (5th Cir. 1980) and *Clark v. Marsh,* 665 F. 2d 1168 (D. C. Cir. 1981). Again, these two cases

concern the issue of whether or not the claimants were constructively discharged and whether the backpay accrual period extended beyond the date of the claimants' resignations. These cases have no application here because this case is not one of constructive discharge.

II.

The decision below that the backpay accrual period must include post-voluntary resignation periods of unavailability from the labor force, and disability incurred in voluntary employment with a subsequent employer is not in conflict with decisions of other circuits.

In support of its argument that the backpay accrual period should not include periods when Whatley was "unavailable" from the labor force Skaggs relies upon several decisions none of which have application to the factual setting here. The first case relied upon by Skaggs is, again, *Taylor v. Safeway Stores, Inc., supra.* As Whatley pointed out above, this decision has no application here because the claimant in that case voluntarily removed himself from the labor force by opting to attend college on a full-time basis rather than seeking full-time employment. He could not have done both and therefore he had to live with his choice to attend school which rendered him unavailable for full-time employment. This militated against his duty and responsibility to mitigate his damages.

In *Sprogis v. United Air Lines, Inc.*, 517 F. 2d 387 (7th Cir. 1975), another case relied upon by Skaggs, the Court affirmed the lower court's exclusion of an eight month pregnancy period from the backpay accrual period.

Such exclusion was proper there for two reasons. First, the claimant, an airline stewardess, voluntarily became pregnant thereby "disabling" herself from the work force, and second, her collective bargaining agreement with the discriminating employer specifically precluded a stewardess from flying during periods of pregnancy. The instant case does not involve a disability voluntarily incurred nor such a specific contractual prohibition.

Skaggs cites five additional cases in support of its argument: *Walston v. School Board of City of Suffolk*, 566 F. 2d 1201 (4th Cir. 1977) where pregnancy period deducted from backpay accrual period; *Ostapowicz v. Johnson Bronze Co.*, 541 F. 2d 394 (3rd Cir. 1976), *cert. denied*, 429 U. S. 1041 (1977), where periods of unavailability due to illness deducted from backpay accrual period; *Peters v. Missouri-Pacific Railroad Company*, 483 F. 2d 490 (5th Cir. 1972), *cert. denied*, 414 U. S. 1002 (1973) where periods when claimants physically unable to work deducted from backpay accrual period (no mention of the nature or cause of the physical disability); *Inda v. United Air Lines, Inc.*, 405 F. Supp. 426 (N. D. Cal. 1975), *aff'd* in part, vacated in part on other grounds, 565 F. 2d 554 (9th Cir. 1977), *cert. denied*, 435 U. S. 1007 (1978), where periods of voluntarily planned pregnancies deducted from backpay accrual period; and *Sangster v. United Air Lines, Inc.*, 633 F. 2d 864 (9th Cir. 1980), *cert. denied*, 451 U. S. 971 (1981) where periods of voluntary idleness deducted from backpay accrual period. In all of these cases with the possible exception of *Peters v. Missouri-Pacific Railroad Company, supra*, the periods of unavailability from the work force were attributable to a voluntarily planned

disability such as pregnancy, illness unrelated to the work in question or voluntary idleness of the claimant.

In *Peters v. Missouri-Pacific Railroad Company, supra,* the Court found a requirement of retirement at age 65 for black firemen to violate Title VII when their white counterparts were allowed to work until age 70. From the applicable five-year backpay accrual period the lower court deducted periods when the claimants were physically unable to work between the ages of 65 and 70. Neither decision the Court of Appeals or the trial court reveal the nature of the cause of the physical maladies of the claimants but one can reasonably assume that advanced age (65 to 70) was the likely cause of the claimant's physical problems which would not have application to the facts here.

At page 17 of its Petition, Skaggs, citing the relevant pages of the trial transcript, suggests that Whatley, after his resignation from Skaggs employ on June 8, 1973, did not look for work or obtain other employment until later in 1974-75. This suggestion by Skaggs is a misrepresentation of Whatley's testimony. Pages 178 and 179 of the trial transcript are as follows:

A. Yes, I did.

Q. Do you recall receiving a copy of your deposition to review after—

A. Yes, I did.

Q. And did you review it?

A. Yes, I have.

Q. And were the answers you gave in the deposition true?

A. The answers pertaining to the questions, yes, they were true.

Q. The answers to the questions that were asked?

A. Yes, to the best of my knowledge.

Q. Do you recall me asking you if you looked for work after you left Skaggs in 1973 in your deposition?

A. I recall that part of the deposition, yes.

Q. Would you look at page 6 of that deposition, Mr. Whatley, and would you look at line 8? Do you recall me asking you this question, it appearing at line 8, page 6 of your deposition: "Did you look for work with any other firm or organization after you left Skaggs other than your real estate business?"

And your answer, "Yes, I did."

And the next question: "And can you tell me when you did that?"

And you said, "Okay, approximately 1975 to 1977." Is that correct?

A. That's correct.

Q. Now, does that refresh your recollection as to when you looked for work between the period 1973 to 1975?

A. Yes, it does.

Q. Okay. And did you—is it your current testimony that, in fact, you looked for work between 1973 and 1975?

A. Yes, it is.

Q. So, in fact, your answer that you gave in the deposition was not correct?

A. This is—in this answer, "1975 to 1977" is when I actually filled out applications for employment with companies.

Q. Well, how would you define "looking for work"?

A. Just going out looking for jobs and talking to people, different companies, and—

Q. Now, wouldn't that involve making applications?

A. Not necessarily, not always, no.

Q. So is it your testimony now that you made application to employers only in that period 1975 to 1977?

A. 1975 to 1977, that's when I went to work for Gold Star Beef Company.

Q. But that you did look without making any applications between June of 1973 and 1975?

A. Yes, on many occasions.

Q. Now, do you recall me asking in the deposition if you would supply me with a copy of the settlement you had in the Workmen's Compensation proceeding?

Appendix A reflects that in 1973 from January to the date of his resignation on June 8 Whatley earned $3,140.18 while in the employ of Skaggs as a warehouseman. From the date of his resignation to the end of that year Whatley earned $7,606.71 while in the employ of Dillon Companies, Inc. In 1974, Whatley earned a total of $7,266.44 while in the employ of four different employers. From January, 1975 to the date of his on-the-job injury in November, 1975 while in the employ of Gold Star Beef Co. Whatley earned $9,281.48. From the date of his on-the-job injury in November, 1975 to the date of trial Whatley was disabled and in his spare time minimally assisted his wife in the

operation of a billiard hall from 1975 to 1979 and drew wages only in 1975 in the amount of $732.77 (p. 66 of App. C of Petition). Petitioner's representation that Whatley was unavailable for work from mid-1973, 1974 and 1975 is simply a misstatement of the record. There is no dispute, however, that Whatley was out of the labor market from November, 1975 to the date of trial in 1980 due to his disability which resulted from his on-the-job injury while in the employ of Gold Star Beef Co. The record is clear that Whatley mitigated his damages diligently. Further, the finding of the trial court that Whatley would not have suffered his disabling injury but for the unlawful termination by Skaggs which forced Whatley into more onerous jobs resulting in his injury while he was attempting to mitigate his damages. The trial court's ruling and its affirmance by the Court of Appeals is consistent with this Court's decision in *Ford Motor Co. v. EEOC, supra.*

III.

The decision below that state disability benefits to claimant to compensate him for periods of disability should not be offset from the backpay award does not raise a substantial federal question.

There is no dispute that Whatley received a lump sum workmen's compensation settlement from the State of Colorado in the amount of $30,126.00. This payment was clearly from a "collateral" source and awarded by the State of Colorado in furtherance of a totally separate social policy. See *Equal Employment Opportunity Commission v. Sandia Corporation,* 639 F. 2d 600 (10th Cir. 1980); *Marshall v. Goodyear Tire & Rubber Co.,* 554 F. 2d 730 (5th Cir. 1977); and *Pedreyra v. Cornell Prescription*

Pharmacies, Inc., 465 F. Supp. 936 (D. Colo. 1979). Furthermore, the trial court's refusal to grant Skaggs an offset of the workmen's compensation award is a matter clearly left to the discretion of the trial court not to be disturbed on appeal absent a showing of abuse of that discretion. *Camacho v. Colorado Electronic Technical College*, 590 F. 2d 887 (10th Cir. 1979) and *Taylor v. Safeway Stores, Inc.*, 524 F. 2d 263 (10th Cir. 1975). Without exception, the cases cited by Skaggs in its argument that it is entitled to an offset recognize the trial court's discretion in determining whether or not to allow an offset. The trial court here properly exercised that discretion and did not abuse it.

The workmen's compensation statute under which Whatley received his lump sum award was designed to compensate him for his injuries in furtherance of social policies of the State of Colorado totally separate and distinct from the purposes and policies of Title VII.

Skaggs has not shown that a substantial federal question has been raised as the decision of the Court below is consistent with the holdings of the cited cases that such an offset is within the discretion of the trial court.

CONCLUSION

For the reasons stated above, Respondent requests that this Court deny the Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

PAUL A. BACA
303 West Colfax Avenue
Suite 950
Denver, CO 80204
Attorney for Respondent

APPENDIX A

(Compiled from Whatley's Trial Exhibits 19, 20 and 21 Which Were His Tax Returns and W-2 Statements for the Years 1973, 1974 and 1975)

1973

Employer	Earnings
Skaggs Companies, Inc.	$3,140.18
Dillon Companies, Inc.	7,606.71

1974

Employer	Earnings
A.C. & S., Inc.	$ 650.94
Dillon Companies, Inc.	882.12
School District No. 1	1,061.21
Gold Star Beef Co.	4,671.17

1975

Employer	Earnings
Gold Star Beef Co.	$9,281.48
Billiard Land (family business)	732.77